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U. S. Department of Justice

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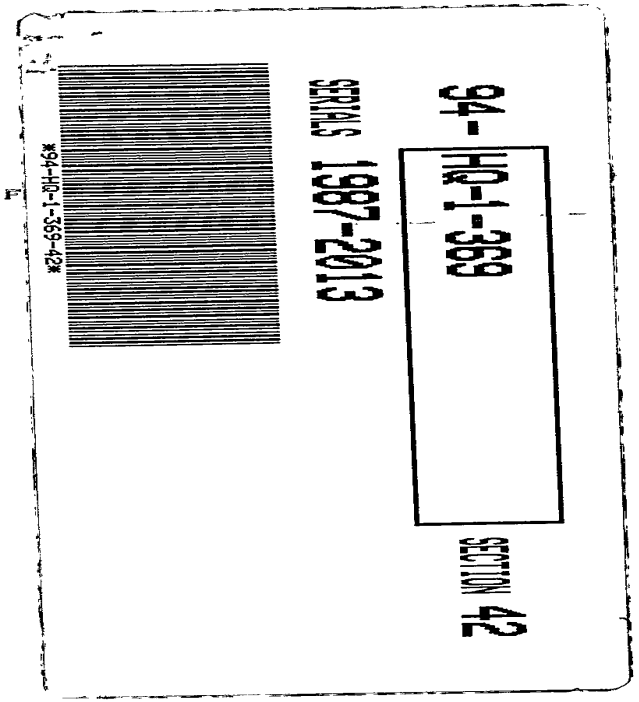

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Please reply to:
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Mr. Tolson	1
Mr. Belmont	1
Mr. Mohr	
Mr. DeLoach	
Mr. Casper	
Mr. Callahan	
Mr. Conrad	
Mr. Felt	
Mr. Gale	
Mr. Rosen	
Mr. Sullivan	
Mr. Tavel	
Mr. Trotter	
Tele. Room	
Miss Holmes	
Miss Gandy	

OSM:MC

August 27, 1965

Honorable J. Edgar Hoover
Director
Federal Bureau of Investigation
Department of Justice
Washington, D. C.

Dear Mr. Hoover:

Many thanks for your thoughtful note of congratulations on my election as President-Elect of the American Bar Association, which is deeply appreciated. On one of my trips to Washington during the coming year, I will take the liberty of telephoning you as I would like to stop in for a few moments and shake hands with a great American.

With best wishes.

Sincerely yours,

Orison Marden

President
FBI
Wash DC.

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UNITED STATES GOVERNMENT

Memorandum

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Rosen
Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

TO : Mr. Felt

DATE: August 19, 1965

FROM : H. L. Edwards

SUBJECT: AMERICAN BAR ASSOCIATION
CRIMINAL LAW SECTION
COMMITTEE ON POLICE SELECTION AND TRAINING

Attached is a copy of the report which I submitted to the Criminal Law Section of the American Bar Association at the annual meeting in Miami Beach, Florida, last week. This report is merely an informative one and contains no recommendations. However, it does highlight the work and leadership of the FBI and the Director.

At the business meeting of the Section, it was moved, seconded and approved to try to have this and other committee reports published in appropriate legal journals so that these reports would receive wider distribution. Newly elected Section Chairman Jim Bennett (former Director of the Bureau of Prisons) even indicated he would try to have the reports introduced into the Congressional Record by some friendly Congressman. Of course, we will not object to any publication and dissemination of this report because it is extremely favorable to the Bureau.

ACTION:

Information.

Enclosure

1 - Mr. DeLoach
1 - Mr. Casper

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ENCLOSURE
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AMERICAN BAR ASSOCIATION

1155 East 60th, Chicago, Illinois 60637 Telephone (312) 493-0533

1965 ANNUAL REPORT
COMMITTEE ON POLICE SELECTION AND TRAINING
SECTION OF CRIMINAL LAW
AMERICAN BAR ASSOCIATION

H. LYNN EDWARDS, CHAIRMAN

(Submitted at the Eighty-eighth Annual Meeting, American Bar Association, Miami Beach, Florida, Criminal Law Section Business Meeting, Wednesday, August 11, 1965.)

In the Annual Report submitted by this Committee at the Eighty-seventh Annual Meeting of the American Bar Association in New York City August 25, 1964, your Committee reported that law enforcement training had become the subject of great interest throughout the country as a primary essential element in fighting crime and strengthening the administration of criminal justice. The 1964 report summarized the status of law enforcement training at the Federal, State and local levels; it cited numerous examples of what has been and was being currently done to give training where none had existed theretofore, to strengthen and expand programs already in operation, and to devise new courses to keep abreast of rapid developments in this field. Reported also was the need for improving quality of law enforcement personnel and intensifying emphasis on professionalization of law enforcement.

Your Committee's 1965 report finds the same theme popular. Improving quality of law enforcement through higher selection standards, better salaries, working conditions and equipment, and intensified training still continue to be among the most critical fronts on which to wage the war against crime and improve the administration of criminal justice.

To add emphasis to the dual stress in this area, your Committee's name was changed from the Committee on Law Enforcement Training to the Committee on Police Selection and Training.

ENCLOSURE # [illegible] - 1988

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During the year covered by this report, the importance of police selection and training has not diminished. If anything, it has significantly increased. Nor has the gravity of the problem lessened. The latest annual issue of the FBI Uniform Crime Reports covering the year 1964 shows a 13 percent increase in serious crimes over the preceding year. Crimes of violence (murder and non-negligent manslaughter, forcible rape, robbery and aggravated assault) climbed 15 percent. Crime continued to outpace population with an increase since 1958 of almost six times the national population growth. Although areas having the fastest growing populations generally report the highest crime rates, nevertheless, all geographical regions in the country registered increases. On the other hand, crimes solved by the police declined 2 percent with 24 percent of the serious crimes being solved by arresting the offenders during 1964.

Although the total number of persons employed in local and state police protection increased substantially during 1964, the ratio of police to population remained the same as in 1963, with 1.9 police employees per 1,000 population. The suburbs, which are registering the sharpest crime increases, are generally below the national average in police strength, having only 1.3 police employees per 1,000 population. Director J. Edgar Hoover of the FBI reported the average police officer strength per 1,000 population has remained unchanged since 1958, despite a 53 percent increase in the volume of crime, a 20 percent increase in motor vehicle registrations and a constantly rising number of demands for other police services. He cited the need for a realistic re-examination of community police protection needs in view of rapid population growth, increasing population density and mobility, and continued refinement of individual rights by the Courts and other groups. Mr. Hoover considers manpower available to law enforcement agencies is inadequate to discharge their mounting tasks.

There is an equally urgent need for improving the lot of the law enforcement officer. Figures in the FBI Law Enforcement Bulletin of September, 1964, indicate the entrance salary for patrolmen in some of our cities having more than 500,000 population is barely $90.00 per week. In many smaller communities with less than 25,000 people, the entrance pay drops to about $50.00 per week. The average monthly earnings of full-time police employees are about $483.00 compared with $503.00 for firemen, $512.00 for public utilities workers, $555.00 for school teachers and $560.00 for public transit employees. Your Committee makes the

obvious observation that law enforcement will never be able to raise the quality of law enforcement manpower to an adequate level unless the salaries, essential working conditions, and fringe benefits are sufficient to attract and hold the type of career employee who will have the qualifications and educational background which this important profession demands.

Public apathy to the needs of local police agencies, disrespect for the police officer, and indifference to crime conditions are breeding places for the downfall of law and order. Law enforcement in any community will be only as strong and effective as the citizens of the locality desire and demand. Your Committee commends and encourages efforts to educate the public to their individual and collective responsibilities in support of their local law enforcement agencies.

Your Committee will now report on some of the most significant advances in this area during the past year.

AMERICAN BAR ASSOCIATION'S TOP LEADERSHIP:

American Bar Association President Lewis F. Powell, Jr., placed major emphasis on the fight against crime and the strengthening and improving of the administration of criminal justice during his presidency. There is ample evidence of this in his speeches and writings. He has given impetus and sustained vigorous support to such programs as the Special Committee on Minimum Standards for the Administration of Criminal Justice under the Chairmanship of Chief Judge J. Edward Lumbard of the Second U. S. Circuit Court.

The Minimum Standards project has made noteworthy progress during its first year of actual existence. The report of this Committee submitted to the House of Delegates outlines the progress of the Advisory Committee on the Police Function headed by U. S. District Court Judge Richard B. Austin. Your Chairman of the Criminal Law Section's Committee on Police Selection and Training is a member of Judge Austin's Committee. Several meetings have been held. This Advisory Committee is participating as part of the American Law Institute's Advisory Committee to assist in finalizing a Model Code of Prearraignment Procedure. In addition, Judge Austin's Committee is concentrating on standards as to selection, qualifications, and training of police, and hopes to have ready a preliminary draft of minimum standards for consideration by the American Bar Association's mid-Winter meeting in February, 1960.

Another development within the American Bar Association is the project of the Standing Committee on the Bill of Rights to issue a proposed handbook for law enforcement officers. In its report to the House of Delegates at the Eighty-eighth Annual Meeting here at Miami Beach, the Committee has submitted a preliminary draft of a proposed handbook containing instructions on how to avoid violations of the provisions of the Bill of Rights. The Committee reported it had conducted a survey of state police officers in all fifty states and the findings indicated the need for such a handbook. The Committee plans to postpone actual publication of the handbook until after January, 1966, in order to permit the various interested committees to review the draft. The Criminal Law Section will certainly want to participate in this review so that the final product will represent the knowledge and experience of members of the Criminal Law Section.

PRESIDENT JOHNSON'S ANTICRIME PROGRAM:

Another significant development during the past year has been the great emphasis placed by President Johnson on the fight against crime. On March 8, 1965, the President submitted a major report to Congress, commonly referred to as his Message on Crime. This report expressed serious concern about the entire problem of crime, not only from the standpoint of the immediate problem as exemplified by an alarming rise in the crime rate, but also from the long-range objective of ferreting out and seeking solutions to the root causes of crime. The President recommended three major programs, one of which was specifically directed to improving local law enforcement through training. He also indicated his intention of assembling a national commission on crime and delinquency.

On July 23, 1965, the President issued Executive Order 11230, establishing the President's Commission on Law Enforcement and Administration of Justice. Among the functions of the Commission, as outlined in the Executive Order, express reference is made to the development of standards and making recommendations for action which can be taken by the Federal, State, and local Governments as well as private persons and organizations to prevent, reduce and control crime and increase respect for law, including but not limited to "improvements in training and qualifications of personnel engaged in law enforcement and related activities."

The President's nineteen-man Commission is headed by the United States Attorney General. The Executive Order authorizes the

Commission to set up Citizens' Advisory Committees, as needed, for the purpose of furnishing the Commission expert information, advice and recommendations to implement the Commission's mandate. The Commission, according to the Executive Order, "shall make reports and recommendations to the President from time to time as it deems suitable and shall present a final report and recommendations not later than eighteen months from the date of this order."

Your Committee's next report will undoubtedly have much information resulting from the work of the President's Commission.

As an additional means of implementing the President's Message on Crime, the Law Enforcement Assistance Act of 1965 has been introduced in Congress (House of Representatives Bill No. 6508 and Senate Bill No. 1792). Hearings have been completed on the House side and similar action is taking place on the Senate side. All indications point to the fact that this legislation is being given much attention with a view to early enactment. This legislation provides for the establishment of a program for three years, designed to start in Fiscal Year 1966, and requests $10,000,000 as an initial appropriation.

This legislation provides authority and funds for grants to public and private nonprofit organizations at all levels for projects and studies to promote the enforcement and administration of criminal laws, correction, and the prevention or control of crime. Specific mention is made of programs to improve the quality and training of state and local law enforcement and correctional personnel. There are also other provisions of this legislation not too pertinent to the scope of your Committee.

MAJOR EXPANSION OF FBI NATIONAL ACADEMY:

Another noteworthy development on the horizon is the contemplated expansion of the FBI National Academy which began in 1935 and has been the cornerstone of professional police training in the United States. Graduation of its Seventy-fifth Session May 20, 1965, brought the total graduates to 4,740 law enforcement officers trained to return to their own departments and serve as instructors and administrators. Of those still active in law enforcement, more than 28 percent are executive heads of their agencies.

Speaking before the graduation exercises of the Seventy-fifth Session of the FBI National Academy on May 20, 1965, Attorney General Nicholas deB. Katzenbach announced that President Johnson had "authorized an increased appropriation of $10,000,000 with which to modernize and expand the facilities of the FBI National Academy at Quantico, Virginia." He stated that these funds would permit the six-fold expansion of the FBI's present capacity to offer training to state and local law officers. The present number of 200 Academy graduates annually would be increased to 1,200.

NATIONAL DISTRICT ATTORNEYS ASSOCIATION:

The National District Attorneys Association, which is the official national organization of state and county prosecutors throughout the United States, has made noteworthy strides during the past year which promise much in the field of local law enforcement education and training. Specifically, the Association received a grant of $112,533.75 from the Max C. Fleishmann Foundation of Nevada to develop an educational and administrative program aimed at enhancing criminal justice. In January, 1965, the Association acquired its first full-time Executive Director, Assistant Executive Director and Secretary, and a part-time publications staff. Staff offices have been set up in the American Bar Center in Chicago.

The Association has announced plans for three regional schools at Kansas City, San Francisco and Philadelphia during November and December, 1965. Included in the program are plans for preparing prosecuting attorneys as teachers of law enforcement officers in such important fields as narcotics problems, confessions, arrests, and searches and seizures, in addition to new scientific investigative aids. Law enforcement officers will be eligible to attend on invitation of the prosecuting attorneys in their districts.

This activity of the National District Attorneys Association is a striking example of the awakening realization on the part of prosecutors to the need for them to keep abreast of the numerous developments in the field of law enforcement and, more important, to actively participate in the training of investigative and other law enforcement personnel.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

The National Association of Attorneys General, which is comprised of the Attorneys General of the 50 states and the territories of Guam, Puerto Rico, and the Virgin Islands, has formed a Liaison Committee on Studies of Law Enforcement and Criminal Justice. This committee was an outgrowth of the Association's Fifty-eighth Annual Meeting in Hawaii in 1964. The objective was to "explore the areas in which the Association and the Attorneys General can work with the American Bar Association to the mutual benefit of the aims of each."

Since its formation, this committee has become increasingly active in participating in and keeping abreast of all studies and projects bearing on the strengthening and improvement of the administration of criminal justice. Also, the Committee on Criminal Law of the National Association of Attorneys General submitted a report at its Annual Meeting in San Antonio, Texas, June 25 - 30, 1965, which pointed up the desirability of each Attorney General, as chief legal officer of his state, to "equip his office as well as he can to inform and advise all agencies of the state government and such others as he may have responsibility to assist with legal services of the rapidly changing requirements and of their implications." In implementing this, a number of state Attorneys General have taken an increasingly active part in the training of police. This is a trend which is most commendable and your Committee hopes to be able to report greater increased momentum in this area in the future.

MISCELLANEOUS DEVELOPMENTS:

In its 1964 report, your Committee indicated the FBI had prepared and printed a special Training Document entitled, "The Federal Law on Search and Seizure" which Director Hoover distributed as a cooperative gesture to Attorneys General of the states, judges, chiefs of police, sheriffs, and all active members of the National District Attorneys Association. In 1965, the FBI prepared an equally timely Training Document entitled "Due Process in Criminal Interrogation." Copies of this document were similarly disseminated to assist in giving needed training in this vital area.

The FBI has continued its active program of providing expert police instructors to lecture free of charge at local police schools throughout the country. During the fiscal year which ended June 30, 1965, some

4,800 local and regional police training schools, attended by nearly 150,000 Federal, State and local officers, were conducted. Particular emphasis was placed on specialized schools dealing with such subjects as mob and riot control, civil rights, and sex crime investigations.

Your Committee also notes some progress in the number of states which have been adopting legislation to provide assistance and guidance to state-wide police training programs at the recruit and, in some cases, in-service levels. In many other states such legislation is being considered. Your Committee commends such action, provided the training curricula are designed and implemented through a training council of knowledgeable and experienced law enforcement executives and provided the instruction is adequately shared by individuals having practical knowledge and experience in addition to requisite academic backgrounds. Such state-wide programs have the obvious advantages of providing top leadership, coordinated efforts, standardized training, a pool of qualified instructors, and desirable uniformity for state and local law enforcement personnel.

The similarly beneficial role of junior colleges, universities and quality institutes in the professionalization of law enforcement education continues to increase. In a number of cities such courses are offered to active police officers at a reduced cost through supporting foundations from city or private sources. Such educational programs should be encouraged and given leadership and impetus by qualified law enforcement personnel.

CONCLUSIONS:

Your Committee is encouraged by the new evidence it is able to report as contained herein. We must not become complacent, however, because the developments have not yet begun to show signs of solving the serious problem of increasing crime. Your Committee believes the evidence justifies its continuance so as to be able to monitor and report upon developments as they result.

Respectfully submitted,

D. LYNN EDWARDS
Chairman

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MAY 1962 EDITION
GSA GEN. REG. NO. 27

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UNITED STATES GOVERNMENT

Memorandum

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Rosen
Sullivan
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Trotter
Tele. Room
Holmes
Gandy

TO : Mr. Felt

DATE: August 17, 1965

FROM : H. L. Edwards

SUBJECT: AMERICAN BAR ASSOCIATION
88th ANNUAL MEETING, MIAMI BEACH, FLORIDA
FORMAL SPEECH BY ERWIN N. GRISWOLD
DEAN, HARVARD LAW SCHOOL

At the annual dinner in honor of the judiciary at the annual meeting of the American Bar Association, Miami Beach, Florida, 8-9-65, Harvard Law School Dean Erwin N. Griswold made the key speech, a copy of which is attached. This speech was the subject of much comment during the meeting and it will probably be referred to considerably in the future because of the extensive interest in the crime problem.

Dean Griswold refers to recent Supreme Court decisions which he states "may seem rough when examined close at hand," but "when viewed in perspective, over a longer range in time, they may take on a more attractive hue." He states he is referring to cases which have come before the Supreme Court involving "confessions obtained through violence, deception or psychological coercion or through ignorance; convictions obtained through illegally obtained evidence; cases of biased juries and judges; cases where convictions were based on evidence known by the prosecuting officer to be perjured; and a host of other cases involving acts violating the spirit and the letter of the Federal Constitution. . ." and then he asks if it isn't clear, in the long view of history, that the time has come to bring ourselves up to a new level in the administration of criminal justice in this country and that the Supreme Court is not only obeying the mandate of the Constitution but also the natural progress of history in taking steps to bring us to a higher level. He then concludes that the critics of the Supreme Court are expressing a natural and understandable concern based on a short-range application of old principles where the Supreme Court has really been concerned with the long view, towards long-range goals and ideals embodied in the Constitution.

After laying this foundation, Griswold then makes the point that many of the state courts in this country have been slow to take the long view whereas if the states, "through their courts, and through their legislative and executive departments, had in the past clearly recognized their responsibilities and had carried them out, it would have been far less necessary for the U. S. Supreme Court to intervene in these matters." He, therefore, urges the states to accept their proper responsibilities and

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Enclosure
1 - Mr. DeLoach
1 - Mr. Casper
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take a "long view of our standards in criminal law, in practice as well as in theory" and this will largely obviate the intervention by Federal courts and friction between state and federal power in this area. He also states it is necessary for the states through their judiciary and bar to initiate and support the search for further improvement in criminal procedure. Griswold indicated the judges frequently are the ones who most resist change.

Griswold then outlined six problems which he said must be solved if "we are to remain in progress with the long stream of history." These are:

1. Prearraignment and Pretrial Conduct of Enforcement Agencies: He mentioned the work of such current studies as the American Bar Association's Minimum Standards Committee under Judge Lumbard, the American Law Institute's work in drafting a Model Code of Prearraignment Procedure. Efforts have been made to solve the problems in connection with providing counsel for the indigent, but many states are lagging. Under this heading, Griswold said there is a need for broad police reform and that the bar and the judiciary must assume the responsibility to help improve the police systems of the states. Griswold stated "Police work is an exceedingly difficult task in modern society. Policemen accordingly must be better educated and better paid. The police should have more instruction in their duties and the conduct in which they may or may not legally engage. This instruction should be made available in much more systematic form than is apparently attempted today in most states. There should be police academies with substantial programs, and appropriate instruction in such academies should be made a prerequisite for appointment to the police force and for promotion. This task should be done by the states, on state initiative. The failure of the states to meet this responsibility will only further detract from an effective system for the administration of criminal justice and from a workable system of federalism."

2. Prejudicial Publicity At and Before Trials: Griswold states much of the difficulty comes "from improper conduct of lawyers and of persons for whom lawyers have special responsibility, such as police officers and sheriffs. Much too much talking has been done by all of these people in the past - announcements about confessions, prior criminal records, and so on."

3. Bail in Criminal Cases.

4. Pretrial Discovery in Criminal Cases: Griswold states that in civil cases "we have largely abandoned the sporting or game theory of justice, and have developed procedures which are well designed to elicit the truth. But we have not generally extended these procedures to criminal cases." Griswold then quotes Dean Pye of the Georgetown Law Center, who, in referring to Federal courts in the District of Columbia, said, "Present procedure requires that an indigent must file a motion supported by affidavits in which he states the names and addresses of the witnesses sought to be called and the testimony he seeks to elicit from them in order to require the attendance of the witnesses at trial. The Rule requires that the motion must be served.

on the United States Attorney, thus granting effective discovery to the Government at a time when the Government is not required to reveal the identity of any of its witnesses nor their expected testimony to the defendant."

5. The Use by Courts of Defendant's Prior Criminal Convictions: Griswold stated, "The man with a prior criminal record in this country is far more at the mercy of the authorities - police and judicial - than seems to me to be warranted." He said he is an immediate suspect for future arrests and if arrested and tried he has two almost hopeless alternatives in many states: (a) he can take the stand and deny his participation in the crime now charged, but if he does his prior conviction can often be shown to impeach his testimony and he will likely then be convicted; or (b) he can refuse to take the stand resting on his constitutional privilege, in which case he is also likely to be convicted. Griswold felt procedures should be developed to seek to bring out the truth about the crime now charged and not some prior crime. He cited Pennsylvania where some progress has been made and also the Uniform Rules of Evidence which provide that if the accused does not offer evidence to support his own credibility the prosecution will not be allowed to prove past criminal acts, arrests, or convictions to impeach him as a witness.

6. Post-conviction Remedies: Griswold contended here most of the friction between state and Federal courts has developed and state courts and other state official bodies should exercise much greater responsibility. Griswold claimed that the guiding principle of post-conviction remedies in Federal courts and in many state courts is that no defendant should be imprisoned or put to death without a complete hearing on his allegations of denial of constitutional rights, and if the states wish to retain their control they must provide a comprehensive and simple method of procedure, whereas most states failed to take adequate action in this area. He feels that when states do this, intervention by the Federal courts as they commonly do now, under writs of habeas corpus, will wither away.

Griswold concluded his speech by making the basic observation that the general responsibility for the administration of criminal law surely rests with the states. Having that responsibility, the states should exercise it fully and meticulously, at all stages of the process, recognizing that they are as much required to apply and enforce the Federal Constitution as are the Federal courts."

This speech does a great deal of subtle snipping at the police and law enforcement in general, which is what we might expect from a man like Dean Griswold. On the other hand, he does put his finger on one of the urgent needs of the day, namely, the need for the states to get their own houses in order rather than to be constantly maligning the Federal Government for taking over the prerogative of the states.

ACTION: For information.

THE LONG VIEW

Speech given by Erwin N. Griswold,
Dean of the Harvard Law School, Cambridge, Massachusetts,
at the Annual Dinner in Honor of the Judiciary,
under the auspices of the Section of Judicial Administration
of the American Bar Association,
at the Fontainebleau Hotel, Miami Beach, Florida,
on Monday, August 9, 1965, at 7 p.m.

It was the older Oliver Wendell Holmes who wrote: "Age like distance, lends a double charm." In this, he was borrowing from Diogenes Laertius, who, some eighteen hundred years ago, said that "The mountains too, at a distance, appear airy masses and smooth, but seen near at hand they are rough." It is perhaps a far cry from mountains to Supreme Court decisions, but there may be something to the analogy. Things sometimes look better when, instead of focusing on immediate problems, we take the long view. Recent Supreme Court decisions may seem rough when examined close at hand. When viewed in perspective, over a longer range in time, they may take on a more attractive hue.

I

Before going farther, I would like to make a disclaimer. I have no special background for the task which I am undertaking tonight. I can by no means match the qualifications which Mr. Justice Brennan brought last year when he addressed the Conference of Chief Justices on "Some Aspects of Federalism."[1] For Justice Brennan spoke with the perspective of seven years as a judge of state courts, both trial and Supreme, followed by eight years as a Justice of the Supreme Court of the United States. His address was a remarkable one, and well worthy of the acclaim it has received. Perhaps the thing I should do tonight is to read it to you, but I have supposed that that would hardly be responsive to Judge Peck's invitation.

The theme of Justice Brennan's address can, I think, be well illustrated by a passage which appears in the record of the trial of Billie Sol Estes, and is quoted in the concurring opinion of Chief Justice Warren in that case.[2] In response to a motion to exclude television from the trial of that case, based on a claim under the Federal Constitution, the trial judge said:

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> "This case is not being tried under the Federal Constitution. This Defendant has been brought into this Court under state laws, under the State Constitution.
>
> . . . . . .
>
> "I took an oath to uphold this Constitution; not the Federal Constitution but the State Constitution; and I am going to do my best to do that as long as I preside on this Court, . . ."

One can respect the sincerity of this judge, but not his perspective, not his understanding of his place in the long view of history. I suspect that there is more of this view to be found in some of our state courts than always comes to light, or than we like to recognize. And surely friction between state courts and federal courts is bound to be found while this point of view continues. I venture the thought that the place where full awareness of the requirements of the Federal Constitution should be clearly recognized and expressed is now in the state courts, instead of leaving this task, as has so often happened, to the various ranks of the federal judiciary.

As Justice Brennan said in his address of last year, "If the States shoulder this burden, and undertake to make this responsibility for the vindication of our most cherished rights their own in this most cherished area of criminal justice, the frictions and irritants that presently exist in some measure between the State and Federal courts will rapidly disappear."

In saying this, I do not want to ignore the fact that some things have recently been found in the Federal Constitution that were not previously known to be there. And more frequently, I think, some things that were rather clearly there, but which have long been overlooked or disregarded, have been given the attention and effect which they should have if our Constitution is to be a truly meaningful document. However new these developments may be, though, they can be more readily accepted, I think, if we consider them in the perspective of history rather than simply as an isolated event.

II

We take pride in the administration of justice in this country, and rightly so. But it has not always been on the level that it has reached now, and we should hardly be surprised if the present level is not the final one. In each instance, as the level

has been raised, those who were currently administering justice have been troubled. It is not easy to accept new things, especially when the impetus comes from elsewhere.

Let us look, for example, at the well-known trial of William Penn, less than 300 years ago. It was not until the aftermath of that case that the independence of the jury was first established. In Penn's trial itself, the court directed the jury to find him guilty. When they proved reluctant, the judge told them:[3]

> "I will have a positive verdict or you shall starve for it . . . . Till now I never understood the reason of the policy and jurisprudence of the Spaniards, in suffering the inquisition among them: And certainly it will never be well with us, till something like the Spanish inquisition be in England."

Fortunately, Penn was released on habeas corpus, as were the members of the jury. And thus, by this novel and somewhat painful event, was the level of British justice, and of our justice, raised.

Through history, the judges who have been known as great judges have been innovators. They have not only made new phrases; they have made new law. Often, there was much grumbling at the time; but in the perspective of history, it becomes clear that they have helped to bring our law up to new levels. And these are levels of which we soon become proud once we become accustomed to them, and the newness of the new standard wears off. One thinks of Lord Mansfield in England, and of Chief Justice Sharswood and Judge Ruffin in the United States. More recently, we have had such judges as Judge, Chief Judge, and Justice Cardozo, Chief Justice Vanderbilt, who was surely an innovator and reformer, not to mention any of the living, such as Justice Schaefer and Chief Justice Traynor in the United States, and Lord Denning in England, who -- along with many others -- are making their clear imprint on our law.

In this connection, I like to think of a story which is told about one of the great innovating judges of the last century, Chief Justice Doe of New Hampshire. One time when he was sitting as a trial judge, New Hampshire still had the rule that the defendant in a criminal case could not testify, even in his own behalf. At that time, we are told, "it was very common for counsel representing the accused to complain bitterly to the jury of the fact

that their clients' lips were sealed; and to assert that, if they could only have the privilege of testifying, they could satisfactorily explain all incriminating circumstances. Judge Doe had probably got very tired of hearing this sort of talk in cases where there was no reasonable doubt of guilt. One day, when a lawyer opening for the defense was making these stereotyped assertions, he was suddenly interrupted from the bench. 'Mr. ----, you may put your clients on the stand.' 'What, your Honor?' 'You will be permitted to call your clients in your own behalf.' The learned counsel, gradually recovering from his astonishment, turned and whispered to his junior: 'Well, John, we shall have to put the rascals on, and the result will be conviction.'"[4]

Thus was the law of New Hampshire changed, later caught up with by a statute which the legislature had too long delayed in passing. I have no doubt that there was much grumbling at the bar at the time, but here again in the long view of history, we can see that the level was raised, that a step upward was taken to the place which we have attained today.

But, you say, Penn's case was 300 years ago, and Chief Justice Doe lived in the middle of the last century; these events were important in bringing us where we are today, but we don't need any more uplift. Let me refer to a case which happened in the fourth decade of the present century, less than thirty years ago. In this case, three men were charged with murder. It appeared that, after arrest, one was hanged from a tree and told he would hang there until he confessed; he still bore the marks of the rope on his neck at the trial. As to the two other defendants, I now quote from the opinion of the two dissenting judges in the state court on evidence which was not disputed.[5] These two defendants

> ". . . were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed or were repeated, they changed or adjusted their confessions in all particulars of detail so as to conform to the demands of their torturers."

Why should this case ever have had to go to the Supreme Court of the United States? But, it is said, that was nearly thirty years ago. Standards of justice have improved in the intervening years. I trust that that is so; indeed, I know that, generally speaking, that is true. But many other cases, perhaps less shocking but still painfully bad, have come before the Supreme Court in the past thirty years, one might even say in ever increasing numbers. These cases involve confessions obtained through violence, deception or psychological coercion, or through ignorance; convictions obtained through illegally obtained evidence; cases of biased juries and judges; cases where convictions were based on evidence known by the prosecuting officer to be perjured; and a host of other cases involving actions violating the spirit and the letter of the Federal Constitution which forbids, in substance, the unprincipled used of governmental power.

Is it not clear, in the long view of history, that the time has come for us to bring ourselves up to a new level in the administration of criminal justice in this country, and that the Supreme Court is obeying not only the mandate of the Constitution but also the natural progress of history in taking steps to bring us to a higher level? The process may be painful in individual cases. There is an understandable reluctance to have to adjust to new standards. But the process can be better understood, and more readily accepted, when it is more widely recognized that the concern of the Supreme Court has been primarily directed towards the long view, towards long-range goals and ideals embodied in the Constitution, while the natural and understandable concern of its critics has more often been focused on short-range application of old principles, and upon more immediate concerns.

The viewpoint I seek to express to you is not merely an academic one. It has been well put by the President of our Association, Lewis F. Powell, Jr., in one of his notable speeches of the past year. Speaking before the New York State Bar Association, Mr. Powell said:[6]

> "The right to a fair trial, with all that this term implies, is one of our most cherished rights. We have therefore welcomed the increased concern by law enforcement agencies and the courts alike in safeguarding fair trial. Many of the decisions of the Supreme Court which are criticized today are likely, in the perspective of history, to be viewed as important milestones in the ageless struggle to protect the individual from oppressive government."

Many courts in this country have been very slow to take the long view, to accept the process by which we raise our standards, or, as I once said in another connection, to join in "the long struggle by which we have made ourselves civilized." If the states, through their courts, and through their legislative and executive departments, had in the past clearly recognized their responsibilities and had carried them out, it would have been far less necessary for the United States Supreme Court to intervene in these matters. And if, today, the states will accept their great responsibilities in this area and will join with the Supreme Court in taking a long view of our standards in criminal law, in practice as well as in theory, intervention by the federal courts, and friction between state and federal power in this area, will, in the future, be largely obviated.

III

But I am not content to rest with asking you to examine, in the long view, what the Supreme Court has done in the field of criminal justice. I want more. I want to urge upon you that the long view of history also requires that the states -- through their judiciary and bar -- initiate and support the search for the further improvement in criminal procedure and procedures which will raise our standards further, and will help us more perfectly to realize the ideals which have developed in our history and are set forth in State and Federal Constitutions.

At this point, though, you say, this is not for us. We are judges, and our function is to administer the law as it is, and not to make new law. I have tried to indicate my view that, at some levels and at some times, at least, that is too narrow a view to take of the function of the judiciary, both state and federal. The role of the judge is, of course circumscribed. But it need not be -- it should not be -- wholly passive. A number of years ago, Judge Harold R. Medina made a notable address which, I think, strikes the right note. It is entitled: "Judges as Leaders in Improving the Administration of Justice."[7] In this address he said:

> "The people of America love their judges; they honor and revere them; and they look to their judges for leadership in the improvement of the administration of justice."

But, he observed, often it is the judges who most resist the developments which are needed. He said:

> "As a student in law school, I got the impression that whenever any much needed reform in judicial procedure was under consideration, the judges made up the tail end of the procession, liberally sprinkling sand in the machinery in an endeavor to continue in the old ways however archaic or outmoded they might be."

Judge Medina also pointed out many honorable exceptions to this tendency. He named Chief Justice Vanderbilt, to whom I have already referred; and he mentioned, too, Judge John J. Parker, Judge Charles E. Clark, Judge Ira W. Jayne of the Circuit Court of Michigan in Detroit, who pioneered with pre-trial procedures, and Judge James M. Douglas of Missouri, who did so much to secure the adoption of a new method for the selection of judges in that state.

Of course, the judges are not alone responsible for bringing about the needed changes. Much of the work must be done by legislators, by the executive branch of the government, and above all by practicing lawyers, often working as members of bar association committees. We know how much devoted work of this sort is done; and it must continue to be done by individual lawyers. But, in many cases, they need the aid and support of the judiciary. They need the benefit of the experience of the judges; and they need, at crucial points, the support of the judges, through testimony and otherwise, before the legislative committees which have these matters under consideration. The problems were well discussed in Judge Breitel's Cardozo Lecture earlier this year which he called "The Lawmakers."

IV

Although this is not an exhaustive list, there are six problems which I would like to outline briefly tonight as ones which still remain to be solved, and which must be solved if we are to remain in progress with the long stream of history.

1. The first and perhaps the most important area for investigation and development is that of <u>pre-arraignment and pre-trial conduct of enforcement agencies</u>. As my colleague of last year, Professor Yale Kamisar, has said, we now do a fairly good job in the mansion house -- that is, in the actual trial of criminal cases -- but conduct in the gate house sometimes leaves something to be desired. This area is surely a difficult one, and it is devoid of simple solutions and quick answers. Among other

things, we are dealing with changing conceptions, throughout our society and the judiciary, as to what our long-range conceptions of "fair trial" and "due process" really are. Here, as Professor Paul A. Freund has said, we are ordinarily dealing not as much with "a clash of right and wrong as a conflict between right and right."[8] Where there is much to be said on both sides, great difficulty is involved, and sometimes, understandably, disagreements may develop.

Recently two major efforts have been launched to bring more clarity to our understanding of this area. One of these is by the special national committee on standards of criminal justice established by the American Bar Association, under the able leadership of Chief Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit. The focus is not solely on pre-arraignment and pre-trial procedures, but these problems will be covered. This great effort to survey the standards of the administration of criminal justice cannot help but shed light all along the line.

A second group, sponsored by the American Law Institute, is endeavoring to draft a Model Code of Pre-Arraignment Procedure. Professor James Vorenberg of the Harvard Law School is the Reporter for the project; he is assisted by Professors Bator and Fried of the Harvard Faculty, and by Dean Edward F. Barrett, Jr., of the Law School of the University of California at Davis, as Associate Reporters. They have already prepared a preliminary draft which has been submitted to their advisers. This is a large group which includes law enforcement officers as well as lawyers and judges. This Code, when completed, will attempt to deal with the specific procedures to be followed by government enforcement agencies during the successive periods of investigation, interrogation, arrest and arraignment.

Apart from these efforts, there are several, perhaps obvious, steps which can be taken by the states, and sometimes by state courts, to mitigate the uncertainties in the criminal process. Many states, for example, have moved forward to meet the new demands for counsel which have finally been made requisite by the decision in Gideon v. Wainright. But a number of states are lagging; and in other states, the old procedures may not prove adequate to meet current conditions. The greater problems of securing competent counsel, and of securing counsel before trial, are now before us; yet the means of securing more counsel and more competent counsel are subjects that defy generalization and simple formulas. Few states as yet provide counsel at all in post-conviction proceedings.

Just as demanding, it seems to me, is the need for broad police reform. We -- both the bar and the judiciary -- must assume the responsibility to help improve the police systems of the states. Police work is an exceedingly difficult task in modern society. Policemen accordingly must be better educated and better paid. The police should have more instruction in their duties and the conduct in which they may or may not legally engage. This instruction should be made available in much more systematic form than is apparently attempted today in most states. There should be police academies with substantial programs, and appropriate instruction in such academies should be made a prerequisite for appointment to the police force and for promotion.

This task should be done by the states, on state initiative. The failure of the states to meet this responsibility will only further detract from an effective system for the administration of criminal justice and from a workable system of federalism.

2. We are beginning to make some progress, I think, with the troublesome question, too long neglected or ignored in this country, of prejudicial publicity at and before trials. We should all welcome, it seems to me, the decision of the Supreme Court in banning television from the court room, at least in the circumstances present in the case which was before the Court. Recently, the Columbia Broadcasting System has announced some rules for its own guidance in the matter of publicity before trials. This is gratifying not only for the awareness it shows of the great problems in this area, but for the willingness of this important agency to take definite steps to meet the problems.

A considerable part of the difficulty in this field comes, as I tried to point out in a talk I gave last year at the Law and Laymen session, from improper conduct of lawyers and of persons for whom lawyers have special responsibility, such as police officers and sheriffs. Much too much talking has been done by all of these people in the past -- announcements about confessions, prior criminal records, and so on. When it is clearly established that no lawyer can talk to the press about these matters before trial, and that police officers and sheriffs and other court officials should be subject to a discipline which will keep them from discussing these matters, we will have made significant progress in our effort to reach a higher standard of criminal justice.

As I pointed out in my talk last year, and as the Supreme Court of New Jersey has so clearly demonstrated,[9] there is much that courts can do about this problem through decision and through

court rul . It is time that the courts accepted the responsibility that is clearly theirs in this important area.

3. Another area requiring careful re-examination, where the courts themselves have a large measure of available power, is in the matter of bail in criminal cases. It has long been the practice in this country to let prisoners be released only on the posting of relatively large bail, often with extremely difficult conditions, such as a requirement that the bond be secured by unencumbered real estate worth several times the amount of the bail. The result has been a substantial discrimination against the poor in the administration of our criminal justice. One consequence of this practice has been pointed out recently by Dean A. Kenneth Pye of the Georgetown University Law Center, who said, in an address delivered before the National Conference on Law and Poverty, "Thus a poor defendant, destined to receive probation, on occasion would be advised by his lawyer that if he demanded a jury trial and was acquitted, he would probably serve six weeks in jail in pre-trial confinement, but that if he waived his jury trial and pleaded guilty, he would probably be freed that afternoon. One must wonder what such a defendant must have thought of the value of his constitutional right to bail and to a jury trial when he was incarcerated during the period in which he was presumed to be innocent and was released after he was found guilty."

Recently studies on the bail problem have been conducted in New York, Washington and elsewhere, under the auspices of the Vera Foundation and others. The results are already interesting and informative. This is a matter which should be looked into carefully by courts in all parts of the country. Leadership to this end might well be provided by the Supreme Court of each of the states.

4. Another matter which should be carefully examined, and where courts undoubtedly have a considerable measure of residual power, is that of pre-trial discovery in criminal cases. We now have extensive discovery and pre-trial proceedings in the federal courts and in many state courts in civil proceedings. In these civil cases, we have largely abandoned the sporting or game theory of justice, and have developed procedures which are well designed to elicit the truth. But we have not generally extended these procedures to criminal cases. It is time that the courts re-examined this problem. It is a difficult area, filled with inertia. As Chief Justice Traynor has said: "The most cogent arguments for change encounter resistance."[10]

Of course there are problems here -- just as there were problems in working out discovery in civil cases. But state judges and state legislators and others should apply themselves to resolving these problems, and not let them go by default, as has been the case in so many states in the past.

Here again I would like to quote from the address delivered by Dean Pye of the Georgetown Law Center, to which I have already referred. Speaking with respect to the federal courts in the District of Columbia, he said: "Present procedure requires that an indigent must file a motion supported by affidavits in which he states the names and addresses of the witnesses sought to be called and the testimony he seeks to elicit from them in order to require the attendance of the witnesses at trial. The Rule requires that the motion must be served on the United States Attorney, thus granting effective discovery to the Government at a time when the Government is not required to reveal the identity of any of its witnesses nor their expected testimony to the defendant."

5. Another matter to which I would like to direct your attention is the use which is made in many of our courts of a defendant's prior criminal convictions. The man with a prior criminal record in this country is far more at the mercy of the authorities -- police and judicial -- than seems to me to be warranted. He may have learned his lesson and have gone straight as an arrow since his release. But he is an immediate suspect for future arrest. And if he is arrested and put on trial, he has two almost hopeless alternatives in many states. He can take the stand and deny his participation in the crime now charged. If he does this, his prior conviction can often be shown to impeach his testimony, in which case he is very likely to be convicted. Or he can refuse to take the stand, resting on his constitutional privilege, in which case he is also very likely to be convicted. Ought we not, even with persons who have once offended against society, undertake to develop procedures which will seek as far as possible to bring out the truth about the crime now charged, not some prior crime?

We accept much self-deception on this matter. We say that the evidence of the prior convictions is admissible only to impeach the defendant's testimony, and not as evidence of the prior crimes themselves. Juries are solemnly instructed to this effect. Is there anyone who doubts what the effect of this evidence in fact is on the jury? If we know so clearly what we are actually doing, why do we pretend that we are not doing what we clearly

are doing? This problem was ably discussed by Dean Wigmore many years ago.[11] Yet, very little has been done about it. Here again I fear that the states have yielded to inertia in these problems, and it is such inertia which eventually leads to federal intervention. There is a good way for the states to avoid such intervention, and that is to take action themselves.

In Pennsylvania, some progress has been made on this question. And the Uniform Rules of Evidence, less broadly, provide that if the accused does not offer evidence to support his own credibility, the prosecution will not be allowed to prove past criminal acts, arrests, or convictions to impeach the defendant as a witness. It is time that the states took action here to provide a rule which, in the words of Professor McCormick, furnishes a "more just, humane, and expedient solution than the prevailing practice."[12]

6. Finally, I would like to refer to the whole field of post-conviction remedies. It is here that much of the friction between state and federal courts has developed. It is here, I suggest, that state courts and other state official bodies should take and exercise a greater responsibility. The guiding principle of such remedies in the federal courts and in many state courts is that no defendant should be imprisoned or put to death without a complete hearing on his allegations of a denial of his constitutional rights, even though objection might validly be made to the timeliness of the accused's assertion of these rights. If the States wish to retain their control over these questions, they must provide a comprehensive and simple method of procedure for convicted persons. Post-conviction relief is a sort of "reinsurance," as Justice Frankfurter termed it, enabling us to make sure that a sentence was not procured under circumstances that offend "the fundamental conceptions of justice which lie at the base of our civil and political institutions."[13]

Though several states have enacted comprehensive procedures for post-conviction review, most states have failed to take adequate action in this area. In terms of the long view, about which I have been speaking tonight, the solution to the problems in this area lies not in limiting federal post-conviction powers to redress alleged violations of federal rights, but in expanding and clarifying the rights and remedies available under state law. Simply put, if the states would adopt post-conviction remedies as comprehensive as that of the federal remedy, removing in the process all recondite technicalities and doctrines of waiver of constitutional rights, then the federal courts would have little need to intervene in state supervision of its criminal proce With

such a state remedy, the exhaustion doctrine could come into effective operation. I am sure the federal courts would like it better. And I should think that the state courts would welcome such an expansion of their procedures, and that many salutary developments in the administration of criminal law might develop.

Such a state remedy would require a complete record, supported by written opinions which will fully discuss the grounds for the decision, and the basis for decision on disputed facts. Here, too, provision should be made for counsel for the defendant, which will help to insure complete fairness in the proceeding, as well as the orderly and adequate presentation of all the relevant facts and arguments.

A number of states have already adopted the approach and wording of the federal general habeas corpus statute, in order to insure that state remedies extend as far as the federal one does. Several other states have adopted the quite adequate post-conviction procedure statute that first appeared in Illinois. A third alternative is the Uniform Post-Conviction Procedure Act, approved by the American Law Institute in 1955. Although this was adopted by only one state -- Arkansas -- and was repealed there, it seems to represent a balanced compromise between the broad federal approach and the somewhat narrower approach of the Illinois statute.

This reform need not necessarily be done by statute. A number of states have proceeded through Supreme Court rule or rule of criminal procedure. It can also be done by expanding the traditional state habeas corpus remedy. Clearly there is great room here for state courts to move ahead. And, as I have indicated, to the extent that the states do deal adequately with this problem, the necessity for federal intervention is eliminated, and friction between state and federal courts can be made to disappear. When such remedies are provided by the states, they should surely be broadly construed and applied by the state courts in order that they may provide a truly adequate remedy, and may meet the objective of assuring a completely fair administration of criminal justice. When this is done, intervention by the federal courts will wither away.

V

I have tried to put before you tonight what I have called the long view of developments in the field of the administration of criminal justice in this country. When this view is taken, recent decisions of the Supreme Court fall into better perspective,

and we see them as part of the continuous process by which we build up and maintain our standards for the administration of criminal justice.

It is now sixty years ago that William Howard Taft said that "the administration of the criminal law [in the United States] is a disgrace to our civilization."[14] And he repeated that statement several times, even after he had become Chief Justice of the United States. It is also sixty years ago this summer that Dean Pound made his memorable address before the American Bar Association on "The Causes of the Popular Dissatisfaction with the Administration of Justice." We have made some progress since that time, but is it not clear that in the long view that progress was called for and needed?

And so I close with what is my basic observation. The general responsibility for the administration of criminal law surely rests with the states. Having that responsibility, the states should exercise it fully and meticulously, at all stages of the process, recognizing that they are as much required to apply and enforce the Federal Constitution as are the federal courts. Although this responsibility is shared by all branches of the state government, and by lawyers and citizens generally, the state judiciary and the state bar have a peculiar responsibility to see that the states themselves perform all of their functions in this area, and perform them in such a way that no question or complaint can fairly be made of a violation of the Federal Constitution.

When we take the long view, it becomes clearer that the progress we have made under the leadership of the United States Supreme Court should be accepted -- indeed welcomed -- and that we should all work towards continued improvement in this area. I have suggested a number of topics which require further consideration. There are others. Let us all join together, and get on with the task.

FOOTNOTES

1. 39 N.Y.U.L.Rev. 945 (1964).

2. Estes v. Texas, 85 Sup. Ct. 1628, 1644 (1965).

3. Trial of William Penn and William Mead, 6 Howell's State Trials 951 (1670), as edited in Chafee, 2 Documents on Fundamental Human Rights 306 (1951).

4. Jeremiah Smith, Memoir of Hon. Charles Doe 15-16 (1897), quoted in Reid, "The Reformer and the Precisian: A Study in Judicial Attitudes," 12 J. Legal Ed. 157, 162, fn. 21 (1959).

5. This opinion was quoted by the United States Supreme Court. Brown v. Mississippi, 297 U.S. 278, 281, 282 (1936).

6. Powell, "An Urgent Need: More Effective Criminal Justice," 51 A.B.A.J. 437, 439 (1965).

7. 36 J.Am.Jud.Soc. 6 (1952).

8. Freund, "Constitutional Dilemmas," 45 B.U.L.Rev. 13, 22 (1965).

9. State v. Van Duyne, 43 N.J. 369, 204 A.2d 841 (1964).

10. Traynor, "Ground Lost and Found in Criminal Discovery," 39 N.Y.U.L.Rev. 228 (1964).

11. 1 Wigmore, Evidence sec. 194, p. 646 (1940).

12. McCormick, Evidence 94 (1954).

13. Taylor v. Alabama, 335 U.S. 252, 272 (1948) (concurring opinion).

14. Taft, "The Administration of Criminal Law," 15 Yale L.J. 1, 11 (1905).

94 1-369-1989

4-572 (Rev. 7-18-63)
OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

Memorandum

TO : The Director

DATE: AUG. 24, 1965

FROM : N. P. Callahan

SUBJECT: The Congressional Record

Pages 20383-20387. Senator Dodd, (D) Connecticut, placed in the Record a resolution adopted by the House of Delegates of the American Bar Association favoring the enactment of S. 1592, a bill to amend the Federal Firearms Act. He also included the report of the Criminal Law Section of the American Bar Association on this same topic and remarks of Senator Tydings, (D) Maryland, on August 10, 1965, before the House of Delegates of the American Bar Association at Miami, Florida.

Original filed in:

94-1-2761-2161

94-1-3267-

NOT RECORDED
145 AUG 31 1965

In the original of a memorandum captioned and dated as above, the Congressional Record for was reviewed and pertinent items were marked for the Director's attention. This form has been prepared in order that portions of a copy of the original memorandum may be clipped, mounted, and placed in appropriate Bureau case or subject matter files.

CC SEP 8 1965

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

Memorandum

Tolson ✓
Belmont
Mohr
DeLoach
Casper
Callahan
Conrad
Felt
Gale
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

TO : Mr. Felt

DATE: August 17, 1965

FROM : H. L. Edwards

SUBJECT: AMERICAN BAR ASSOCIATION
88th ANNUAL MEETING, MIAMI BEACH, FLORIDA
SPECIAL COMMITTEE ON FEDERAL RULES OF PROCEDURE

Attached is a copy of the report of the American Bar Association's Special Committee on Federal Rules of Procedure which was submitted to and approved by the House of Delegates at the captioned annual meeting. The portion of this report dealing with the Rules of Criminal Procedure is of interest to the Bureau because the Bureau has been expressing its concern to the Department concerning some of the proposed revisions, especially the proposed revision known as Rule 16 (Discovery and Inspection).

The Judicial Conference Standing Committee on Rules of Practice and Procedure had submitted a Second Preliminary Draft with which the Bureau is familiar. Rule 16 pertaining to discovery and inspection had been revised considerably in the Second Preliminary Draft largely because of numerous objections raised by the Department as a result of observations submitted by the Bureau.

The Chairman of the Association's Special Committee on Federal Rules of Procedure, Franklin Riter, gave extensive oral comments in submitting his report to the House of Delegates, the gist of which was that there was more controversy concerning the Rule on discovery than any other single portion of the proposed revisions of the Criminal Rules of Procedure. In brief, the Judicial Conference had proposed a very great liberalization which, in effect, would have made available to the defense practically the whole case of the prosecution in the pretrial stages, including such items as laboratory reports. The Second Preliminary Draft restores the existing restrictions on discovery to a great extent.

In view of the various points of view and the controversy existing General Riter stated that his committee was recommending in its report to the House of Delegates that approval be given to merely transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure the various views of the several interested committees and sections of the Association without endeavoring to reach any agreement. Riter indicated that it was virtually impossible to reach any unanimity and, therefore, the committee felt that the dissenting views should be made available to the Judicial Conference. This recommendation was approved by the House of Delegates.

Enclosure
1 - Mr. Casper
HLE:mbk

ENCLOSURE ATTACHED

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EX-111

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So far as the Bureau is concerned, it is felt this solution is in the best interest of the Bureau because we would stand a better chance of having our views recognized and adopted through efforts of the Department. Accordingly, the attached report is being made available to the Legal Research Desk of the Training Division which has been following the proposed revisions of the Rules of Federal Criminal Procedure.

RECOMMENDATION:

That this memorandum and its attachment be referred to the Training Division, attention Legal Research Desk.

August, 1965 - No. 53

AMERICAN BAR ASSOCIATION

SPECIAL COMMITTEE ON

FEDERAL RULES OF PROCEDUREE

RECOMMENDATIONS

1. That the committee be continued.

2. That the American Bar Association favors the adoption in substance of the amendments to the Federal Rules of Civil Procedure proposed by the Judicial Conference's Standing Committee on Rules of Practice and Procedure for the purpose of effecting unification of civil and admiralty procedure and urges the Judicial Conference to give careful consideration to specific comments and suggestions submitted to its standing committee by this Association's Committee on Federal Rules of Procedure.

3. That the American Bar Association favors in principle the adoption of Uniform Rules of Appellate Procedure for the Federal courts and authorizes its Special Committee on Federal Rules of Procedure to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee views and any dissenting views on the Uniform Rules of Federal Appellate procedure as presently proposed or as may be subsequently revised by the advisory committee on such rules.

4. That the Special Committee on Federal Rules of Procedure is authorized to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee

views and any dissenting views on the various specific amendments to the Federal Rules of Civil Procedure as now proposed or as may be subsequently modified by the Advisory Committee on such rules.

5. That the Special Committee on Federal Rules of Procedure is authorized to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee views and any dissenting views on the various specific amendments to the Federal Rules of Criminal Procedure as now proposed or as may be subsequently modified by the Advisory Committee on such rules.

REPORT

INTRODUCTION

The committee has directed its attention to the drafts of Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Appellate Practice and Rules governing the unification of admiralty and civil practice being considered by the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. More specifically, the committee has studied the following proposals of the Standing Rules Committee of the Judicial Conference:

(1) Amendment to effect unification of civil and admiralty procedure, March 1964, and subsequent revisions;

(2) Preliminary draft of proposed Uniform Rules of Federal Appellate Procedure, March 1964;

(3) Amendments to the Rules of Civil Procedure for the U.S. District Courts proposed by the Advisory Committee on Civil Rules, March 1964 and subsequent revisions;

(4) Second preliminary draft of the proposed amendments to Rules of Criminal Procedure for the U. S. District Courts, March 1964.

The committee has met on numerous occasions as a whole and through various of its subcommittees. It has exchanged voluminous internal correspondence and has corresponded extensively with other groups within the association and in the legal world generally. In addition, it has, on an informal basis, in a number of instances, transmitted specific views and suggestions to the reporters for the various advisory committees to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

The committee wishes particularly to thank the following groups with which it has maintained close liaison: The General Practice Section; the Criminal Law Section; the Antitrust Law Section; the Judicial Administration Section; the Maritime Law Association; the Real Property, Probate and Trust Law Section; the Insurance, Negligence and Compensation Law Section; the Admiralty and Maritime Law Standing Committee; the Patent, Trademark and Copyright Section.

We have not considered the issue of modification of the copyright rules. The subject has been referred to the Section on Patent, Trademark and Copyright Law by the House of Delegates.

In connection with our proposals concerning amendment of the Federal Rules of Criminal Procedure we recognize that the current extensive program of the Special Committee on Minimum Standards for Administration of Criminal Justice will also necessarily be considering procedural matters covered in part by our report. We do not

intend to foreclose the Minimum Standards Committee from any recommendation which it may deem appropriate at the conclusion of its study but because of the immediate probability that the Federal Criminal Rules will be amended before the completion of the minimum standards project we deem it necessary to take a position as to those proposed amendments at this time.

This committee has been in direct communication with Judge Lombard, Chairman of the Special Committee on Minimum Standards for the Administration of Criminal Justice, and has reached an understanding with him in this regard. Copies of our preliminary studies have been furnished to Judge Lombard and we intend to transmit to him a copy of our final report upon its approval by this House.

Recommendation #1--Continuation of Committee

The work of the Judicial Conference of the United States with respect to rules of practice is continuing. While substantial progress has been made, it is obvious that new drafts and revisions of drafts will be proposed to the bar and submitted to the United States Supreme Court for adoption during the coming years. Unlike the situation where a specific piece of legislation is being proposed to Congress, the work of the Judicial Conference and its advisory committees presupposes a continuing cooperative endeavor with the bar. It is desirable, therefore, that this committee be granted some flexibility in transmitting its views on an informal basis while proposals also are being formulated by the advisory committees and by the Judicial Conference of the United States. If each proposal or each draft were to be separately passed upon by the House of Delegates, the rules-making process of the United States Supreme Court would be stultified. It is obvious

that a more flexible approach is required in the area of law making. Accordingly, we are recommending the continuation of this committee. We are also recommending that the committee be authorized to make its views known to the Judicial Conference and its advisory committees. When such views are transmitted, it will be made clear that it is the committee itself and not the entire Bar Association that is speaking. The committee will, of course, transmit any dissenting and concurring opinions and will endeavor, insofar as possible, to reflect communications made to it by members of the bar generally as well as by the various groups cooperating with it.

Recommendation #2--Unification of Civil and Admiralty Procedure

In March 1964, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference published certain proposed amendments to the Civil Rules for the purpose of effecting unification of civil and admiralty procedure (hereinafter referred to as the "March 1964 Draft"). Under date of May 1, 1965, Professor Brainerd Currie, Reporter to the Advisory Committee on Admiralty Rules, submitted modifications of the March 1964 Draft to his Committee as well as to this committee and other interested persons. Such modifications will hereinafter be referred to as the "May 1965 Draft". We understand that on June 28, 1965, the Standing Committee reviewed the March 1964 Draft as amended in May 1965 and made certain changes which do not materially affect our report.

The unification proposal as amended would combine legal, equitable, and admiralty or maritime claims in the "one form of action" of present Civil Rule 2. As a result, the Federal Rules of Civil

Procedure would be generally applicable in claims now triable as suits of admiralty, with the characteristic features of present admiralty practice preserved in a few special provisions of the merged rules and in an appended body of "Supplemental Rules for Certain Admiralty or Maritime Claims." The heart of the proposal is new Rule 9 (h) which provided that in claims which now could be tried either at law or in admiralty the complaint may contain a statement identifying the claim as an "admiralty or maritime claim." Claims identified by such a statement, and also claims as to which admiralty is the only basis of Federal jurisdiction, will be tried subject to the special admiralty provisions and to the "Supplemental Rules." The other important feature of the proposal is amended Civil Rule 18, under which admiralty or maritime claims may be joined with legal and equitable claims, provided that there is an independent basis of Federal jurisdiction for each claim. Rule 9 (h) will insure that for purposes of trial the characteristic features of present civil and admiralty practice are preserved where appropriate, despite the joinder.

Our recommendation that unification be approved is consistent with the previously expressed policy of the American Bar Association. In February 1962, the House of Delegates passed a resolution favoring "unification of the rules of practice of the Supreme Court of the United States in Civil and Admiralty matters, in so far as practicable." 87 A.B.A. Rep. 155. The report of the Standing Committee on Admiralty and Maritime Law, upon which this resolution was based, recognized the trend toward some form of merger of admiralty and civil practice and found that "actual unification into a single set of rules...modeled basically on the Civil Rules"

would in the long run be the preferable method of effectuating such a merger, provided that extensive and careful studies were undertaken to insure promulgation of "a realistic,workable set of rules, readily available to each member of the American Bar." 87 A.B.A. Rep. 226, 229. We believe that the March 1964 Draft as revised in May 1965 is consistent with the policy expressed in the 1962 resolution and amplified in the report of the Committee on Admiralty and Maritime Law.

In formulating our recommendation we have given careful consideration to the views of the Maritime Law Association. In November 1964 the Association adopted a resolution (1) stating its preference for a separate set of Admiralty Rules revised to incorporate desirable features of the Civil Rules, but (2) in the alternative urging that, if the March 1964 Draft were to be adopted, it would be modified in accordance with seven specific recommendations set out in the resolution. These recommendations were designed to deal with certain of the specific objections to unification outlined in the first part of the resolution. The resolution was based on a report of the Association's Committee on Supreme Court Admiralty Rules favoring a separate set of Admiralty Rules, but recognizing "That unification in some form is inevitable." The report went on to state that in the March 1964 Draft "there havebeen preserved most of the essential features of admiralty practice; and that by modification and amendment the remaining essential features of that practice can be preserved within its framework." MLA Doc. No. 479, October 1964.

The May 1965 Draft substantially incorporates the MLA's seven specific recommendations. Subsequent to the promulgation of that

Draft by the Advisory Committee on Admiralty Rules, the MLA Rules Committee reported to the MLA that changes had been made which would comply in substance with five of the seven recommendations and that the Advisory Committee had felt that the remaining two recommendations could be complied with without change. Although it continues to prefer a separate set of Admiralty Rules, the MLA Rules Committee is presumably satisfied that the unification proposal in the May 1965 revision preserves "the essential features of admiralty practice."

The detailed reasons for our recommendation have previously been circulated among the members of the House of Delegates as Appendix I to our Admiralty Rules Subcommittee's Report. They may be briefly summarized as follows:

The proposed unification merely merges civil and admiralty procedure, providing a single civil action for law, equity and admiralty, governed by a single body of procedural rules. The substantive maritime law (applicable even now whether a maritime case is tried "at law" or in admiralty) is in no way altered by the proposal, nor is there any merger of the several separate jurisdictional bases of the Federal Courts. In fact, despite the merger, distinctive admiralty remedies, such as limitation of liability, process in rem, foreign attachment, and trial to the court, are preserved for what are now suits in admiralty.

The advantages to be derived from unification are many. The Advisory Committee's proposal will put an end to the possibility of dismissal of a claim within the jurisdiction of the federal court merely because it has been brought on the wrong "side" of the court. It will permit

the permissive joinder of related claims and compulsory counterclaims whether admiralty or civil, allowing the parties to resolve all their differences in a single proceeding. It will make all the modern procedural devices of the Civil Rules and future amendments of them available in admiralty. It will eliminate traps for the unwary arising from the near similarity, yet subtle differences betweenmany provisions of the Civil Rules and the present Admiralty Rules. It will thus terminate what seems to us an undesirable burden upon the cautious lawyer who must now familiarize himself with two distinctive sets of procedure.

We do not find the reasons offered by the opponents of unification weighty enough to offset those advantages. Constitutional and statutory objections are without merit in view of the carefully limited procedural scope of the changes proposed. The various arguments that separate Admiralty Rules are needed to preserve the procedural flexibility necessary for the proper administration of the substantive maritime law are not persuasive. Not only do the Admiralty Rules already closely approach the Civil Rules in many respects, but the proposed Supplemental Rules will preserve most of the distinctive features of admiralty practice in an easily administered, separate body of rules. The provisions for joinder of claims are said to be potentially productive of confusion in the trial of cases, but we do not anticipate any more difficulty in this regard than ensued as a result of the merger of law and equity. We also find unpersuasive the argument that unification of civil and Admiralty procedure would unduly burden or "adulterate" civil procedure used by attorneys who seldom or never encounter an admiralty case. On the contrary, it is precisly these attorneys who will

benefit from a readily accessible single set of rules.

While we recommend approval of procedural unification and the general method proposed to achieve it, we suggest certain editorial and technical revisions in the form and scope of specific rules. We have been in communication from time to time with Professor Currie and have submitted to him the comments and suggestions of this nature set forth in our Admiralty Rules Subcommittee report previously circulated among the members of the House of Delegates. We believe that these comments and suggestions are entitled to careful consideration by the Judicial Conference of the United States prior to the submission of the unification proposal to the Supreme Court.

Recommendation #3--Uniform Rules of Federal Appellate Procedure

Since the promulgation in March 1964 of the Preliminary Draft of Proposed Uniform Rules of Federal Appellate Procedure, there has been much discussion of the proposal among members of the bar, The American College of Trial Lawyers, the Ninth Circuit Judicial Conference, the Federal Bar Association, the Department of Justice and others have submitted lengthy critiques. As a result, we understand that the Advisory Committee intends to present a second draft that may differ substantially from the proposals which we have examined. Accordingly, we do not consider that action by the American Bar Association on the specific proposals contained in the March 1964 Draft would be appropriate or meaningful at this time.

It is our conclusion, however, that some form of Uniform Rules of Appellate Procedure for the Federal courts should be adopted with the right reserved to each Court of Appeals to adopt further rules not inconsistent with the uniform rules. The wide variations now

existi. among the several circuits on matters of common concern in all ... deral courts are a potential source of unfairness to litigants, as well as a burden on lawyers whose practice extends beyond a single circuit. We therefore recommend that the American Bar Association favor the principle of uniform appellate rules.

We also urge that this committee be authorized to cooperate with the Advisory Committee in formulating a new draft, particularly by furnishing to it our detailed preliminary comments on the March 1964 Draft contained in a subcommittee report of this committee as previously circulated to the members of the House of Delegates.

Recommendation #4--Proposed Amendment to Rules of Civil Procedure for the U.S. District Courts other than those dealing with unification with civil admiralty procedure

We recognize the desirability of stability in the rules. In the first place, a certain amount of confusion and additional work is caused as the bench and bar become familiar with new formulations and accommodates practice to them; often litigation is required in order to determine the meaning of the revised language. In the second place, some of the States may be unwilling to follow each amendment in the Federal Rules so that the policy of uniformity between state and federal practice will be disserved. Nevertheless, the Federal Rules were drafted thirty years ago and substantial modifications are called for. While they have proven extremely effective, they have themselves created a change in our approach to litigation, making possible and desirable further advances and improvements. Moreover, it would have been unreasonable to expect that minor difficulties in drafting and divergencies in interpretation would not have to be resolved from time to time.

In our opinion the Advisory Committee has exercised good judgment and sound discretion in providing improvements in the Rules while maintaining their essential stability.

We have considered very carefully the impact of the proposed changes on State policy. As noted above, the issue of changes as they affect uniformity between state and federal practice has, in our opinion, been properly resolved by the Advisory Committee. The effect of the proposed changes in federal practice on "substantive" policies of the states have also been considered by us. The recent case of Hanna v. Plumer _____U.S._____, 14 L. Ed. 2d 8 (1965), has, in our opinion, failed to eliminate the difficulties. Indeed, they have, if anything, added to the burdens of draftsmen of amended federal rules. The majority opinion in the Hanna Case states fairly clearly that the rule making power is as broad as Congress' legislative power. As it noted, a Federal rule is valid unless:

> "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." Id. at_____, 14 L. Ed. 2d at 17.

The Court used the normal legislative test for determining validity declaring:

> "a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." Id. at_____, 14 L. Ed. 2d at 17

Rulemakers must, therefore, weigh, in much the same way as Congress might, the desirability of uniformity and efficiency in federal litigation against the desirability of permitting the states,

wherever possible, to exercise power and enforce their own policy in areas normally regulated by the states.

A good example of the difficulties are found in Clause 1 of subdivision (b) of Rule 23 (Clause 1 of Proposed Rule 23.1) requiring that:

> "the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law." (New matter is underlined.)

In the main, the relations between shareholders and directors, so far as they relate to stockholders derivative suits, are controlled by the states. Obviously, requirement of ownership of shares at the time of the act complained of limits somewhat the possibility of shareholder suits against company officials. It does, therefore, affect the practical procedural-substantive balance in the corporate field. Whatever our judgment might have been had the issue been posed in the first instance, in view of the more than a quarter of a century history of the federal provision and the current stockholder-management balance, which has been achieved in part because of it, we believe the judgment of the Advisory Committee in retaining the provision is sound.

We have examined each of the proposed changes with this question of impact on substantive rights and State policy in mind and, in our opinion, in no instance has any substantial impact been made which is not far outweighed by a probable beneficial result on Federal Practice and judicial administration.

A considerable amount of attention was given to the question of appealability. It is our opinion that, particularly when the modifications are being initially interpreted, it is desirable to permit appeals whenever there is presented a substantial procedural issue, the proper resolution of which may have a substantial effect on the litigation.

In this connection we urge that Subdivision (b) of Section 1292 of Title 28 of the United States Code be utilized more frequently than it has been to permit appeals from decisions on procedural matters which may be decisive in a litigation or which may appreciably reduce expense. That provision permits an appeal where it is "the opinion" of the District Judge;

> "that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The Court of Appeals must also give permission for the appeal.

The provision has been used infrequently, only in the most "exceptional cases." See, e.g., 1960 Dir. Admin. Office U. S. Courts Ann. Rep. 72-73; H. R. Rep. No. 1667, 85th Cong., 2nd Sess., 2 (1958); Milbert v. Bison Laboratories, 260 F. 2d 431 (3d Cir. 1958). We think that this excessively restrictive useage is unfortunate.

In the case of some amendments, such as those to Rule 19 and Rule 23, there has been substituted for what appeared to be mechanical tests utilizing seemingly fixed terms such as "indispensable," "necessary," and "joint or common, or secondary," more descriptive terminology. As indicated below, we approve

the amendments as providing more accurate guides for the exercise of judicial control over procedure in practice. We should be disturbed, however, if the change in the form of the Rule caused the Courts to determine that there was no "controlling question of law," but only questions of "discretion" not subject to review under Subdivision (b) of Section 1292 of Title 28. It is noted in this connection that the proposed amendment to Rule 19 is based in part upon such provisions as those in New York and Michigan. See, Mich. Gen. Court Rules, R. 205 (effective Jan. 1, 1963); N.Y. Civ. Prac. Law & Rules, 1001 (effective Sept. 1, 1963). Our information is that the New York and Michigan Rules are working well. Part of the bar's approval of the New York Rule, however, is predicated on the fact that intermediate appeals are allowed so that review may be obtained from an appellate court before the litigation is far advanced.

It may be desirable for the Judicial Conference of the United States to review the question of intermediate appeals generally. The current crowded appellate docket is, in our opinion, no justification for unduly restricting intermediate appeals where they may be useful in securing "the just, speedy and inexpensive determination" of an action. See, Rule 1.

One final minor housekeeping point should be noted. In modifying its March, 1964 draft the revised notes of the Advisory Committee do not indicate reasons for changes. In a number of instances, the reasons for changes are clear from a comparison of the March, 1964 draft and the May, 1965 draft. In other instances the reasons become clear only in the light of the specific objections and

suggestions made by the bar and bench to the Advisory Committee. Since this legislative history is often extremely difficult to reconstruct, it would be helpful, in the future, where the problem may arise, to indicate reasons for changes.

The detailed analysis of the proposed amendments to the civil rules have previously been circulated among the members of the House of Delegates in the form of a subcommittee report. This report and the dissenting view of one member of the committee will be transmitted to the Judicial Conference.

Recommendation #5--Proposed Amendment to Rules of Criminal Procedure for the U.S. District Courts

This committee recommends approval of all proposed amendments found in the Second Preliminary Draft, with the exception of new Rule 12.1 (Notice of Insanity); the amendments to proposed Rule 15 (Depositions); the re-written Rule 16 (Discovery and Inspection); and the amendment to Rule 24 (Trial Jurors) which would permit replacement of jurors who "are found to be" disqualified. The Committee recommends further amendment of Rule 49 (Service and Filing of Papers) and agrees with the Section of Criminal Law that Rule 6 (The Grand Jury) should be amended to require disclosure of grand jury minutes after indictment.

Discussion:

A. Rule 6 (The Grand Jury). After careful study, described below, the Section of Criminal Law and this Committee recommend that:

(1) Rule 6(e) of the Federal Rules of Criminal Procedure

be amended to provide that a reporter transcribe the minutes of all proceedings of grand jury which are accusatorial in nature; that the cost of such transcript be borne by the government of the United States and the proceedings in transcribed form be filed in a sealed envelope with the appropriate United States District Court for further necessary action;

(2) Similar action be taken either by changes in the rules of court or by necessary legislation in the several states which follow the common law practice described herein;

(3) After an indictment has been returned against a defendant, and after his arrest, that a copy of the grand jury minutes or transcript be furnished to him as a matter of right, upon his request, prior to his arraignment or as soon thereafter as is practicable; except in cases where the government reveals that national security or public interest is involved, in which event grand jury proceedings shall not be disclosed without an order of the court.

The reasons for the Section's recommendation are stated in the report of a Section Committee headed by Judge Gerald S. Levin, of the Superior Court of California at San Francisco. The reasoning of Judge Levin's committee is persuasive to this committee. A copy of his report, which is the basis for our recommendation, has previously been circulated to the members of the House of Delegates and will be transmitted to the Judicial

Confer , of the United States.

B. Rule 12.1(Notice of Insanity). The proposal to require a defendant to give notice before trial that he will raise the defense of insanity is opposed by the Section of Criminal Law and by the Board of Regents of the American College of Trial Lawyers. It is the opinion of this committee that this proposal may have, in many instances, the effect of denying a defendant defenses which are constitutionally open to him on his plea of "not guilty". An essential part of the prosecution's burden in every case is to prove the mental capacity of the defendant, even though this burden may be tacitly satisfied in most cases by a presumption of sanity. If a defendant is insane, it seems unrealistic to impose any requirement upon him limiting his ability to raise his mental capacity. We feel that many problems in this area will be resolved by intelligent application of Proposed Rule 17.1 (Pretrial Procedure), which we endorse, and which will require "conferences to consider such matters as will promote a fair and expeditious trial." The question of the manner in which the government should be able to prepare for the issue of insanity is being considered by the American Bar Association Minimum Standards Project and we do not mean to foreclose whatever recommendations that project evolves.

C. Rule 15 (Depositions). The Advisory Committee would permit depositions taken at the instance of prosecution. Even though some states tolerate prosecution depositions (a questionable practice since April 5, 1965, when the Supreme Court held that the Sixth Amendment controls the States; Pointer v. Texas, No. 577, O.T. 1964, 33 Law Week 4306), the United States Supreme Court, interpreting

the Sixth Amendment right "to be confronted with the witnesses", held in Mattox v. United States, 156 U.S. 237, 242-243:

> "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Pretrial discovery on the part of the defense has not been expanded to a point at which the defendant's rights can be fully protected in the taking of depositions. In the traditional trial setting, a witness who is excused from the stand may be recalled later in the trial of the parties later become aware of additional questions which should be asked of the witness. At least during the trial, the parties have total discovery of the evidence which is going to be admitted at the trial. When depositions are to be taken in advance of trial, however, the parties may not have a complete understanding of the significance of such witnesses' testimony and may be unable to examine them adequately. By their terms, the amendments to Rule 15 would permit such depositions "to prevent a failure of justice." If the testimony of such an absent witness is of such great importance that "a failure of justice" might result in

the absence of his testimony, it should be apparent that the witness is important enough so that the jury should have a chance to see and observe his demeanor.

The prosecution is not without resources under the present state of law. See United States v. Haderlein, 118 Fed. Supp. 346, in which the court arranged to transport the jury, the marshal, clerk, court reporter, and counsel for all parties to the home of a sick witness for the purpose of taking his testimony under conditions which would allow the jury to see his demeanor.

C. Rule 16 (Discovery and Inspection). The amendments to this Rule proposed in the Second Preliminary Draft are opposed by the Section of Criminal Law. The Board of Regents of the American College of Trial Lawyers has also withheld its approval. The proposed amendments of this Rule have been drastically changed since the Preliminary Draft which was approved by our Special Committee on Federal Rules of Procedure in February of 1964. This committee adheres to its endorsement of Rule 16 as it would have been amended by the preliminary draft.

The latest draft of this Rule, which would either condition defense discovery upon discovery by the government in Rule 16 (c), or alternatively, would permit discovery by the government independently of defense discovery, raises grave constitutional questions. The Fourth Amendment embraces a right to refuse to produce "mere evidentiary materials." (Gouled v. United States, 255 U.S. 298, 305-306; United States v. Lefkowitz, 285 U.S. 452, 464-465.) A Search warrant under any other name is still a search warrant and it is this committee's opinion that an order permitting the

government discovery which would be tolerated in Rule 16 (c) would amount to an unconstitutional search and seizure.

The proposed amendment limits defense discovery under Rule 16 (a) only of certain reports "known by the attorney for the government to be within the possession, custody, or control of the government." This qualification, added in the Second Preliminary Draft, would place a premium on failure of administrative agencies to forward certain reports to the U. S. Attorney and upon lack of diligence by the U. S. Attorney in determining what reports exist. Acting in a similar context, Congress imposed no such qualification in the "Jencks" statute, 18 U.S.C. 3500.

D. Rule 24 (Trial Jurors). The amendments to this Rule would permit selection of six alternate jurors, instead of the four provided by the present Rule. This committee has no objection to that proposal, but the amendment would also permit the replacement of jurors who "are found to be" Disqualified during the course of the trial. Presumably, this would include disqualification for bias, and adoption of this Rule will place a premium on intensive investigation of the empaneled jurors during the trial, when their independence is most important. In effect, the voir dire examination would continue throughout the trial. Each side will have a real motive for penetrating the jurors' privacy to ferret out any conceivable ground for disqualification. Such a practice is sure to lead to all kinds of improprieties and will inevitably place special pressures on jurors who learn from their neighbors and friends that they are under investigation.

E. Rule 49 (Service and Filing of Papers). Neither we,

Nor the College of Trial Lawyers, nor the Section on Criminal Law, oppose the amendment to Rule 49 (a) which would require all motions to be served upon "each of the parties." It is obviously fair and just that all parties have notice of all pleadings filed in the case. The Section of Criminal Law suggests, however, and we agree, that the rule should be amended to give discretion to the district judge to permit any party, upon application, to serve only a written notice on the other parties inviting their attention to a pleading filed with the court. In its present form, the amendment may place considerable burdens on appointed counsel for indigent clients at mass conspiracy trials, and the judge should at least have the power to relieve counsel of that burden.

The Criminal Law Section additionally opposed the amendment of Rule 18 and the elimination of Rule 19, which would have the effect of permitting a district judge to transfer cases from division to division within a district whether or not the defendant consents. It is our conclusion that such discretion should be vested in the trial judge since it is obvious that there can be appellate review of any claimed abuse of discretion.

Respectfully submitted,

Franklin Riter

Franklin Riter, Chairman

FD [redacted] (Rev. 5-22-64)

FBI

Date: August 9, 1965

Transmit the following in _____
(Type in plaintext or code)

Via AIRTEL _____
(Priority)

Mr. Tolson
Mr. Belmont
Mr. Mohr
Mr. DeLoach
Mr. Casper
Mr. Callahan
Mr. Conrad
Mr. Felt
Mr. Gale
Mr. Rosen
Mr. Sullivan
Mr. Tavel
Mr. Trotter
Tele. Room
Miss Holmes
Miss Gandy

TO: DIRECTOR, FBI
(Attention: Assistant Director Felt)

FROM: INSPECTOR H. L. EDWARDS

AMERICAN BAR ASSOCIATION
88TH ANNUAL MEETING
MIAMI BEACH, FLORIDA

This summarizes sessions of Sunday, 8/8/65, and Monday morning, 8/9/65.

Standing Committee on Education Against Communism met all day Sunday. One of the most important matters covered consisted of having former ABA President and current member of the House of Delegates, LOYD WRIGHT, meet with Committee in effort to reach a meeting of minds and satisfy WRIGHT re WRIGHT's criticism of the Teacher Training syllabus and thereby avert any controversy in House of Delegates when Committee report comes up for consideration, probably Tuesday, August 10th.

WRIGHT indicated that although he favored education against Communism and was in sympathy with the need for properly training teachers so that they could teach American students in the contrast between Communism and democracy, he had certain reservations about the final draft of the Committee's syllabus. Specifically, he felt that some of the authors listed in the bibliography of suggested reference reading were avowed Fabian socialists and he feared their inclusion in bibliography might give teachers a license to use these authors, which WRIGHT said they might in some cases do to the exclusion of other authors whose works were listed therein. Committee explained to

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WRIGHT that the omission of representative authors of one viewpoint would expose the document to criticism from other quarters and the Committee felt the syllabus should not discriminate in this regard; however, the Committee emphasized to WRIGHT that there could be no question from a reading of the text of the syllabus that it took a firm and hard position against Communism and in favor of democracy. WRIGHT did not seem seriously concerned over this point, but his primary objection to the syllabus was that he felt it should contain right at the outset an "eye-catching," strong statement to alert the reader immediately to the fact that the teacher training is designed to give the teacher a well-grounded knowledge of the superiority and advantages of the American way of life in contrast to the disadvantages and dangers of Communism. Although it was emphasized to WRIGHT that this very point is stressed in the Committee's preface, which constitutes the introductory portion of the syllabus, WRIGHT felt the matter was so important and the likelihood of the reader missing the point was so possible in WRIGHT's mind that he felt the syllabus would be strengthened by placing such a statement in brief, eye-catching terms on the inside of the front cover immediately preceding the preface.

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WRIGHT's session with the Committee terminated amicably and following WRIGHT's departure, the Committee agreed to immediately institute action to strengthen the syllabus as indicated. Although WRIGHT made no commitment, it now appears the syllabus may avoid any attack in the House of Delegates.

The Committee heard a report from [redacted] Executive Vice President, National Association of Manufacturers, who appeared as a guest, and it is likely that the Committee will be receiving cooperation from the NAM in its effort to have certain worthwhile private organizations cooperate in appropriate programs to further the Committee's fight against Communism. To illustrate some of the work the NAM has done in other areas, [redacted] described programs designed to encourage private interests to solve problems which heretofore tended to place undue dependence on the Federal Government. For example, [redacted] said NAM had set up a Student Aid Fund to satisfy the need for student loans without dependence on Government. Another group is conducting pilot study to demonstrate that student rejects and school drop-outs can be trained and absorbed into

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the business community through private effort. The current pilot study is designed to bring several Negro girl students from Harlem and train them to be competent typists despite an average sixth-grade education. [redacted] stated these programs document the emphasis NAM is now placing on positive action rather than placing stress on ideological concepts of solving community social problems which characterized their past efforts. He stated these current programs are well received by liberal groups because of the documentation available from case studies and [redacted] cited this to support his opinion that liberals are moving away from their position of favoring Government intervention as solution to community and social problems.

Committee also received report from another guest, [redacted] Chairman of American Legion Americanism Committee. He described numerous experiences in meeting with students on college campuses and advised Committee the Legion is currently developing special program in effort to counteract Communist speakers on campuses. He indicated American Legion speaker group would consist of articulate speakers with a good background in law or former FBI employment. [redacted] expressed opinion that non-Government speakers can be much more effective in this program, primarily because non-receptive students might contend Government representatives are controlled by Government political policy. [redacted] cited several guide lines which such speakers should adhere to in handling these campus appearances, such as how to handle the delicate question-and-answer periods, etc.

Committee then discussed projects and plans for the coming year. One of these is to periodically review and publish up-to-date meaning of peaceful co-existence. Also to periodically issue a bulletin stressing current status of the "Teach-In" movement and this will be used to help counteract the Communist efforts on college campuses. The Committee also plans to develop friendly, dependable and competent members in such groups as the American Law Student Association, the Phi Delta Phi Legal Fraternity, the National Student Association and the specially selected young people chosen by the American Legion Boys' State and Boys' National Program. These contacts will be used to keep alert to and counteract the Teach-In movement.

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RICHARD ALLEN of the Georgetown University Center for Strategic Studies reported he is in charge of a program to send carefully selected refugees to talk on college campuses. ALLEN stated there is a $40,000 grant available to subsidize these expenses and ALLEN has the authority to designate which speaker should handle each assignment. ALLEN urged the Committee to send him the names of colleges where such refugee speakers might be effective.

[redacted] advised the Committee that he is working to prepare a guideline for college administrators to help them in coping with problems arising from campus demonstrations. [redacted] indicated he is working jointly with the Association of College Presidents. [redacted] also mentioned that students are prone to organize and therefore there is a need for training programs to teach carefully selected students the know-how of organizing and thus enable them to counteract the undesirable student organizations.

The Committee also took cognizance of a continuing and increasing need to educate all lawyers as to why lawyers should be deeply interested in the fight against Communism. Too many lawyers are still asking why the American Bar Association has any business in this field. One remedy cited by the Committee is the need for a strong, effective article in such publications as the ABA Journal, to educate the lawyers along this line.

Committee member [redacted] of North Carolina stated that the Teacher Ban Law will probably be the object of vigorous action in Chapel Hill, North Carolina, in order to tests its constitutionality.

L. B. NICHOLS reported on the current status of the J. Edgar Hoover Library project. NICHOLS advised the Committee that the organizational work has been completed and he credited Chairman LEIBMAN's law firm for having done the extensive legal work in connection with completing the organization and stated LEIBMAN had arranged for this work to be done without charge. NICHOLS reported more than $200,000 has been raised but this is only a drop in the bucket.

Finally, the Committee decided to concentrate during the next year on urging the state and local Bar associations to activate committees to aid in the fight against Communism. It was emphasized that the Leibman Committee must determine what policy will be followed to give proper guidance and control to these state and local committees so that they will avoid the dangers and pitfalls in dealing with the delicate areas of Communism.

The Criminal Law Section Council met all day Sunday. The most significant matter discussed was the anticipated fight in the House of Delegates in connection with the Section's efforts to secure ABA endorsement of the Dodd Bill regulating firearms. The ABA Board of Governors refused to take any position for or against this bill and merely voted 12 to 7 to permit the issue to go to the floor of the House of Delegates. This item will probably come up in the House on Tuesday, August 10th, or Wednesday, August 11th. It is generating much interest. The National Rifle Association representative is attending the ABA Convention and vigorously lobbying against the bill. He has requested unanimous consent to speak on the floor of the House of Delegates and Senator TYDINGS has demanded equal time in the event the NRA representative is given clearance.

On Monday morning, August 9th, a breakfast meeting was held by the Judge Lumbard Special Committee for Minimum Standards Criminal Justice. Progress reports were received from all six advisory sub-committees and these reflected considerable work has been done to date in all areas. It was apparent at the breakfast meeting that the biggest controversy will be between the defense-minded members on the one hand and the other group representing those who feel society's rights have been subordinated too much in favor of the criminal.

Further reports will be submitted as the ABA meeting continues.

FD-36 (Rev. 12-13-56)

FBI

Date: 8/7/65

Transmit the following in _____
(Type in plain text or code)

Via AIRTEL _____
(Priority or Method of Mailing)

Mr. Tolson ✓
Mr. Belmont ✓
Mr. Mohr ✓
Mr. DeLoach ✓
Mr. Casper
Mr. Callahan
Mr. Conrad
Mr. Felt
Mr. Gale
Mr. Rosen ✓
Mr. Sullivan ✓
Mr. Tavel
Mr. Trotter
Tele. Room
Miss Holmes
Miss Gandy

b6
b7C

TO: DIRECTOR, FBI
(Attention: Assistant Director FELT)

FROM: INSPECTOR H. L. EDWARDS

AMERICAN BAR ASSOCIATION
88TH ANNUAL MEETING
MIAMI BEACH, FLORIDA

This summarizes pertinent information regarding sessions Saturday, 8/7/65.

Standing Committee on Education Against Communism met all day. Committee appointments for next year made by incoming president, EDWARD KUHN, and membership remains the same, except for Miami attorney [redacted] replacing long-time committee member EGBERT HAYWOOD of Durham, N.C. MORRIS I. LEIBMAN continues as chairman. Financial condition of committee healthy in view of receipt of $100,000 grant from Scaife Foundation of Pittsburgh, Pa., which will be renewed for next three years. Fifty thousand dollars, or half of each annual grant, to be devoted to continuing and extending teacher training institute programs and remainder to subsidize intensive study and appropriate educational program to emphasize the contrast between Soviet law and American law system. Committee has also received two additional grants of $10,000 annually for next three years, one to be earmarked for teacher training institute program and other for continuing work in area of current communist tactics. Committee has pending before the American Bar Association Endowment Fund Committee an application for $64,000 annually for next three years to subsidize its educational programs. However, chairman announced that information had just been

REC-38 74-1-369-1992

EX-101

9 SEP 9 1965

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

57 SEP 14 1965

received indicating that [redacted] of California is opposing approval of this grant in view of [redacted] criticism of the committee's recently published teacher training syllabus in that [redacted] feels the bibliography of recommended readings contained therein lists some books which [redacted] feels are "soft on communism" or somewhat favorable to Fabian socialism.

The Bureau has previously been advised that the preliminary draft of the teacher training syllabus was criticized at the 1963 annual meeting in Chicago, when some 200 letters were received from California, all of which were identified at the time as emanating from members of the John Birch Society or its sympathizers. At that time, [redacted] voiced some criticisms of the preliminary draft on the floor of the House of Delegates but the committee had already earmarked all of these criticized portions of the preliminary draft for correction and all have been corrected in the final draft as published. The committee had contracted for the preparation of the syllabus with a group of educators and the portions of the preliminary draft to which criticism was directed were not the result of any improper leanings or sympathies on the part of the educator staff but to the contrary, were the result of a lack of complete knowledge on their part of some of the information concerning the cold war and communist tactics, strategy and objectives which the committee itself immediately recognized and corrected.

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Regarding the bibliography which is reportedly [redacted] present bone of contention, the committee deliberately included in the bibliography a balanced list of reference works, realizing that to do otherwise would subject the syllabus to criticism from other groups and thereby impair the effectiveness of the syllabus as a teacher training tool. The text of the syllabus clearly and strongly takes a hard line against communism and cannot in any fair sense of the word be said to be soft on communism. As previously reported on, the Director's "Masters of Deceit" and "A Study of Communism", in addition to such articles as the "Harvard Business Review" article, are included in the bibliography. As the Bureau is aware, [redacted] has the reputation of being somewhat of an extremist. The outcome

of this current threatened controversy will not be known until the committee report is considered by the House of Delegates, probably next Monday or Tuesday.

The committee was given a briefing on the current communist threat by its program director, [redacted] who is a faculty member of the National Army War College, which gives periodic cold war briefings to key reserve officers. [redacted] stated he is convinced that the Communist Party, USA, has achieved a new and very dangerous vitality within the past 18 months and that the domestic threat of communism is thereby greatly increased. He based this on impressions and conclusions he personally reached at the last session of the War College, concluded in mid July, 1965, from the briefings given the War College by representatives of the Central Intelligence Agency, the Department of Defense and the FBI. As examples, he cited the intensive and deliberate efforts of the Communist Party to influence the current civil rights and peace movements. He stated in his opinion, these two movements are approximately 97% pure and properly motivated but the danger lies in the remaining 3%, which he contends constitute dedicated and deliberate communist efforts to capitalize on these activities. [redacted] felt this new and dangerous vitality of the Communist Party was evidenced by such communist-inspired and directed programs as the DuBois Clubs. He said the Party is conducting a training school intended to intensify campus demonstrations this fall which will be more extensive than the Berkeley demonstrations. He predicted there will be efforts to commit massive violations of the Espionage Act. He said there is much evidence that the Party is engaged in activities to harass the families of men serving in and the survivors of soldiers killed in Viet Nam. [redacted] said there is danger in a so-called new breed of communism coming out of the Orient and generated in Red China which combines the Soviet doctrine of Marxism with racism.

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[redacted] stated all of these things emphasize the need for all lawyers to become concerned whereas to date, most of the concern and counteraction has been

concentrated in a handful of lawyers working through the [redacted] committee. He said there is also a need for outside groups such as business and trade associations and other influential organizations to become more concerned and join in the fight against communism.

The reaction to [redacted] serious and somber remarks was noteworthy. [redacted] presentation contained nothing new insofar as the Bureau's knowledge and interest are concerned. Although [redacted] evaluation of the seriousness of the communist threat has been known to the Bureau and preached by the Director without letup and in the face of opposition, it is refreshing to realize that private individuals of [redacted] stature are now so seriously concerned.

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The committee was also briefed by [redacted] Washington correspondent for the "Readers Digest." He furnished highlights and distributed samples of propaganda gathered from a recent survey conducted around the country, which he stated has been compiled into a lengthy feature article which he hopes will be published by "Readers Digest" approximately next October. The theme is primarily the communist influence and participation in such activities as student riots and demonstrations. [redacted] referred to some of the communist-influenced sit-ins, such as the one that recently took place in Oakland, Calif., in an effort to thwart sending troops to Viet Nam. [redacted] had predicted that such sit-ins will greatly increase in scope and he felt they would include sit-ins in missile producing and launching sites at the Strategic Air Command bases and the like. [redacted] privately indicated to EDWARDS and [redacted] that he has been in contact with appropriate people at the Bureau concerning his findings and his proposed article.

[redacted] which is a public relations coordinating activity for some 1400 key officials in the steel industry, summarized a project he has been developing which places emphasis on conducting high-level seminars and educational programs for the wives of steel executives during their various regional conventions. These include films and briefings concerning the threat of communism and the need

for education in the contrast between communism and democracy. A follow-up phase of the program is to have these women return home and endeavor to interest individuals responsible for education in their communities and otherwise endeavor to obtain subsidies for sending selected teachers to the teacher training institute so that they can conduct proper educational programs on the dangers of communism. [redacted] stated he plans a series of such programs this fall involving 24 chapters of the Steel Service Center Institute throughout the country, representing approximately 1400 key people. He hopes the success of his programs will motivate other proper groups to do likewise.

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The committee also received an excellent briefing from BYRON ENGLE, Director of the Office of Public Safety, Agency for International Development, which handles the foreign police training program and the International Police Academy. ENGLE exhibited numerous slides illustrating this program and documenting its value in fighting international communism and the threat it poses to the newly-emerged countries of the free world. ENGLE was most profuse in his priase of the Director and the Bureau. He cited the valuable work of the Bureau in having a representative on the committee set up by President KENNEDY to evaluate and recommend strengthening action for the foreign police training program. He commented on the continuing cooperation he receives from the Bureau and he stated that the United States can feel most fortunate in having a law enforcement system which stands as a model of excellence and which is in large measure attributable to the outstanding leadership and dedication of the Director. He said this is the ideal toward which the foreign police program is striving in the free countries where ENGLE's program is involved. In private conversation, ENGLE advised EDWARDS and [redacted] that he had been most disturbed over the recent killing of the foreign police training supervisor in Southeast Asia, former Special Agent RYAN. He stated, however, that he was most relieved to learn that an extensive inquiry into this incident confirmed the fact that RYAN had not been guilty of any moral turpitude with the foreign air force officer's wife and the facts developed to date indicate RYAN was

actually trying to resolve the situation which had developed between the foreign officer's wife and the American who killed RYAN.

ENGLE was accompanied by Congressman JOHN O. MARSH, JR., of Virginia, who introduced him and expressed himself as being very much interested in doing what he can to further the committee's programs and combat the threat of communism.

The LEIBMAN committee is scheduled for all-day sessions Sunday. Summaries of pertinent action will be submitted.

WW

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

Memorandum

Tolson
Belmont
Mohr
DeLoach
Casper
Callahan
Conrad
Felt
Gale
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

TO : Mr. Felt

DATE: August 31, 1965

FROM : H. L. Edwards

SUBJECT: LEWIS F. POWELL, JR.
PAST PRESIDENT, AMERICAN BAR ASSOCIATION

NATIONAL DEBATE TOPIC

Attached is a letter dated 8/28/65 to me from Lewis F. Powell, Jr., immediate past President of the American Bar Association. He encloses some communications he has received and a copy of one of his replies, all bearing on inquiries for information and material regarding this year's national debate topic, "Resolved that Law Enforcement Agencies Should be Given Greater Freedom in the Investigation and Prosecution of Crime."

Powell feels the FBI has a major stake in such a debate and that it is particularly important that faculties and students receive accurate and objective information. He suggests the Director may wish to have the Bureau develop some material which might be made available to both sides in colleges and universities with debating teams.

The Crime Records Division has recently sent out a SAC Letter alerting the field to this debate topic and instructing that any inquiries for information bearing on this be referred to the Seat of Government for acknowledgement.

RECOMMENDATIONS

REC. 13 94-1-369-11993

1. That this memorandum and its attachments be referred to the Crime Records Division for appropriate action.

EX-113

5 SEP 15 1965

2. That Crime Records Division consider the feasibility of Powell's suggestion that some specific material bearing on the pros and cons of this debate topic be developed so as to be available for supplying inquirers with same.

CRIME RESEARCH

SEE ADDENDUM P 2

Enclosures
1 - Mr. DeLoach

55 SEP 21 1965

HLE:bhg (4)

H. L. Edwards to Felt memo
RE: LEWIS F. POWELL, JR.

CRIME RECORDS DIVISION
ADDENDUM: ELC:jma 9-2-65

For Mr. Edwards' guidance in his correspondence with Mr. Powell, Jones to DeLoach memoranda of 8-12-65 and 8-19-65 pointed out that we have been furnishing general material on the subject of law enforcement to college students upon request in connection with their national debate topic this year. With regard to Powell's suggestion, we have furnished extensive reprint material containing the Director's observations on the general topic of law enforcement to the Library of Congress where a compilation of several hundred selected excerpts, both pro and con on the debate topic, is being prepared for publication by the Government Printing Office as a House document. This document will be available to the students. As indicated, the field offices have been instructed to refer any requests to the Bureau for consideration as we have a collection of material readily available. It is noted that each request is considered separately inasmuch as the general debate topic is apparently being broken down into specific areas. For example, we have had a request for material on wire tapping and eavesdropping. With regard to the copies of letters Mr. Powell sent along, he apparently is referring the individuals to the FBI as well as other sources for material. Inasmuch as we already have general reprint material on the subject of law enforcement, it would seem unnecessary to prepare additional material. Also, there will obviously be specific breakdowns of the general debate topic making it necessary for us to tailor the reprint material to the individual request.

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Mr. [redacted] - Page 2 - August 20, 1965.

It is apparent to me that some self proclaimed academicians who wrote the first miserable Fabian Socialist preachment are still writing "Democracy Confronts Communism in World Affairs". I regret exceedingly that money should be spent by the American Bar, who have so many opportunities of spending their money forcefully and efficiently, on a piece that fails to develop confrontation in its truest sense. I had hoped that there would be an awakening on the part of the Committee, the Chairman, and [redacted] to realize that the excuse for this piece is that the American High School teachers need indoctrination so that they can truthfully teach the evils of the atheistic gangsters in control of the Communist party, who have repeatedly announced their intention to change our form of government. It is no credit to any loyal American that their counterpart, the Fabian Socialists, have been sufficiently forceful in succeeding Administrations as to take us so far down the road of Socialism as to make it doubtful in the rational mind that we can ever recapture the freedoms and privileges that the individual enjoyed when he was free from the domination of a centralized bureaucratic government in Washington.

Unfortunately and unhappily, and, on reflection, a suspicious circumstance so far as I am concerned, the Committee can send this book out to libraries and all kinds of institutions, but they are not required to send it to the members of the House of Delegates, which, in the last analysis, is the fountainhead of their authority, and of the finances they utilize.

I had hoped that after the House of Delegates had accepted the promise of the Committee to withdraw all copies of the '63 dissertation, that perhaps a light would dawn, and the Committee would be constrained to get new authors, seasoned men who would not under any circumstances preach convergence or fear, but apparently the same incompetent crew (incompetent from the standpoint of fundamental Constitutional government) have been turned loose on this piece. Apparently there is nothing that can be done except to arouse the public to the fact that this is one of those unfortunate situations where the tail wags the dog and the tail having once been caught in a trap did not learn its lesson.

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I protested to the Committee the utter inefficiency of the misleading Bibliography, which has so much room for such persons (whom I consider to be traitors) as Rostow and Overstreet, and such fools as Morgenthau, but no space whatever for solid, constructive criticism of the insidious attacks by the Communists.

Apparently the Committee had the bit in its teeth and, encouraged by the star-gazers in the academic field, indulged in high-sounding reports to the House of Delegates without giving the House a chance to measure the progress accomplished, with the result that the great body of the ABA will be attacked again, and properly so, for being inefficient, and less than competent.

I regret to have to write you in this vein. I had hoped that the Committee would do a fine, American job. As stated before, they have promised to put in a reference to another piece by another section of the American Bar on "Americanism", and so far as I am concerned I have accepted that as a promise, when fulfilled, which I hope will be sufficiently strong to overcome the nasty Fabian taste that lingers in your mouth when you read the thing. Having gone over it again since my return from Miami I am heartsick, and while I have promised, so far as I am concerned, that if the proper and appropriate adjustments of the Bibliography and the fly-leaf reference are adequate I will not personally make further fights against it (though I feel that were I a member of the Committee and on the second time around couldn't do a better job than this miserable piece I would resign), there is no reason whatever why any one else should hesitate to speak forthrightly and sincerely, but not in carping criticism, and expose it for what it is -- a lot of trash that in the last analysis is a help and not a deterrent to the Socialist [redacted]

LW:11
Copy to each member of the
ABA Standing Committee on
Education Against Communism
Copy to: Hon. Lewis Powell; Pres. Elect. Ed. Kuhn
Copy to: Mr. [redacted]
Mr. [redacted]
General Clyde Watts
General Franklin Riter
Mr. [redacted]
Hon. strom Thurmond
Hon. James B. Utt

Last Retiring
OFFICE OF THE PRESIDENT
LEWIS F. POWELL, JR.
AMERICAN BAR CENTER
CHICAGO, ILLINOIS 60637
TELEPHONE (312) 493-0533

AMERICAN BAR ASSOCIATION

RICHMOND OFFICE
ELECTRIC BUILDING
RICHMOND, VIRGINIA 23212
TELEPHONE (703) MILTON 3-0141

August 28, 1965

Inspector H. Lynn Edwards
Federal Bureau of Investigation
Washington, D. C.

Dear Lynn:

I enclose copies of two letters which indicate that the "national debate topic" for this year is: "Resolved that Law Enforcement Agencies Should Be Given Greater Freedom in the Investigation and Prosecution of Crime".

I judge that colleges and universities with debating teams, and which compete for national recognition, will have this as a common topic.

It seems to me that the FBI has a major stake in such a debate. It is particularly important that college professors and students receive accurate and objective information on the problems of law enforcement, and on the relation of these problems to crime.

You may wish to discuss this with Mr. Hoover, and consider the possibility of some material being developed which could be made available to both sides in the colleges and universities with debating teams.

Sincerely,

Lewis

24/167
Enc.

ENCLOSURE

94-1-369-1993

16(-6)

PURDUE UNIVERSITY
DEPARTMENT OF SPEECH
LAFAYETTE, INDIANA 47907

August 25, 1965

Mr. Lewis F. Powell, Jr.
Lawyer
Richmond, Virginia

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Dear Mr. Powell:

Your opening address at the ABA assembly in Miami a few weeks ago interested me since I am a faculty advisor to the Purdue University debate teams and this year we are arguing the proposition, Resolved: That law enforcement agencies in the United States should be given greater freedom in the investigation and prosecution of crime.

The purpose of this letter is to ask if you could guide us to some reading material on our topic. Perhaps you would even be willing to send us a complete copy of your speech before the ABA. Any help at all that you can give us at this time will be highly appreciated. Thank you.

Sincerely yours,

[redacted]

Faculty Advisor

RJM/lgm

ENCLOSURE

94-1-369-1993

[redacted]

Lubbock, Texas

August 18, 1965.

Lewis F. Powell, Jr.
88th President of the American Bar Association
Richmond, Virginia.

Dear Sir :

The national debate topic this year is Resolved: That law enforcement agencies in the United States should be given greater freedom in the investigation and prosecution of crime. I would appreciate not only any information or opinions that you might have, but also any references that you might know of which pertain to this topic.

b6
b7C

Sincerely,

[redacted]

ENCLOSURE

94-1-369-1993

b6
b7C

Last Retiring
OFFICE OF THE PRESIDENT
LEWIS F. POWELL, JR.
AMERICAN BAR CENTER
CHICAGO, ILLINOIS 60637
TELEPHONE (312) 493-0533

AMERICAN BAR ASSOCIATION

RICHMOND OFFICE
ELECTRIC BUILDING
RICHMOND, VIRGINIA 23212
TELEPHONE (703) MILTON 3-0141

August 28, 1965

Prof. [redacted]
Purdue University
Lafayette, Indiana 47907

Dear Prof [redacted]

Replying to your letter of August 25 as to reference material on criminal justice and its current problems, I suggest the following articles in the American Bar Journal:

Lumbard, "The Administration of Criminal Justice" 49 ABAJ 840 (1963)

Shawcross, "Police and Public in Great Britain" 51 ABAJ 225 (1965)

Powell, "More Effective Criminal Justice", 51 ABAJ 437 (1965)

In the latter article you will find in the footnotes a few additional references.

The index to Legal Periodicals, available in your law school, will lead you to many articles in the Law Reviews on various aspects of criminal justice, including articles specifically relating to the investigation and interrogation problem.

The American Law Institute has a project dealing specifically with prearraingment procedures and problems. You may wish to write the Director of the ALI, Prof. [redacted] Columbia University School of Law, New York, New York. He may be able to send you a copy of the preliminary draft of the ALI recommendations.

ENCLOSURE

94-1-3-67-1993

1 Xerox copy
made 9-1-65
pde

I think you would find some help in some of the speeches of J. Edgar Hoover, and in the reports of the FBI. Also, some of the reports by Congressional Committees contain a great deal of useful information. Your Congressman could send you a copy of the report of the Committee on the District of Columbia of the House of Representatives, 89th Congress, dated March 17, 1965, proposing strengthening of the criminal laws in the District of Columbia.

You asked about my annual address at Miami. This will be published in the September issue of the American Bar Association Journal.

With best wishes, I am

Sincerely,

L. F. P.

24/167

[redacted]

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b7C

Illinois 61604
August 19, 1965

Mr. Lewis F. Powell, Jr.
c/o National Crime Commission
U.S. Dept. of Justice
Washington, D.C.

Dear Mr. Lewis Powell:

As a college debater preparing for the topic on greater freedom for law enforcement officials, I hope you will be able to help me. After reading your article in the May ABA Journal, I think you may be able to help me.

I'm very interested in the problem of rape. The questions that I'm hoping to answer are - how many rape cases are solved? - how are these rape cases solved? - how can we legally gain confessions from rapists (if it is at all possible)? I'd wondering if you or any materials you may be able to obtain for me can help answer these questions.

I understand that the new Commission on Crime will make a report at the end of eighteen months. I'm hoping that I'll be able to get some

ENCLOSURE

94-1-3[illegible]-1993

the hearings or reports from the Commission, of which the Commission will during the next nine months. I wonder if you can help me get this information either by sending it to me - or letting me know where I can write for it. If nothing will be available for the next eighteen months except minutes of meetings, I'd like to have them. In other words I'd like to keep up on everything the Commission is doing.

Please excuse the condition of this letter but I've not let my family's vacation in the West halt my research. In fact I am writing by kerosene lantern in a campground in Nebraska. Any help you can give me on the topic will be greatly appreciated.

Thank you for your time and trouble.

Sincerely,

[redacted]

b6
b7C

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

Memorandum

Tolson
Belmont
Mohr
DeLoach
Casper
Callahan
Conrad
Felt
Gale
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

TO : MR. FELT

DATE: September 2, 1965

FROM : H. L. EDWARDS

SUBJECT: AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON EDUCATION AGAINST COMMUNISM

CRITICISM OF TEACHER TRAINING SYLLABUS BY LOYD WRIGHT

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As a member of the ABA Standing Committee on Education Against Communism I received in the mail the attached copy of a letter dated August 20, 1965, addressed to Mrs. [redacted] Northwest, Atlanta, Georgia, from Loyd Wright of Los Angeles, former President of the American Bar Association and currently a California Delegate to its House of Delegates. Wright, it will be recalled, headed up the Special Commission on Government Security in the 1950s and the Bureau had considerable difficulty with him during that special assignment. Other references in Bureau files label Wright as extremely conservative, partisan, and dictatorial. Mr. Nichols is well known in Bureau files primarily because of correspondence from Mrs. [redacted] in which she raised a number of questions concerning certain liberal individuals and organizations particularly in the Atlanta area. It appears that the husband had the title of Post Researcher for the American Legion Post in Atlanta. The [redacted] are undoubtedly ultraconservatives.

Loyd Wright's letter is a three-page typewritten criticism of the recently published Teacher Training Syllabus, "Democracy Confronts Communism in World Affairs," which was prepared by the Institute of International Studies, University of South Carolina, under contract with the Standing Committee on Education Against Communism and after meticulous review and approval by the committee this syllabus was published as a "Suggested Syllabus, Bibliography, and Guides for Teacher Training: Institutes, Workshops and Seminars" on the contrast between communism and democracy.

REC- 76 62-1-369-1994

The Bureau has previously been advised that Loyd Wright objected to certain portions of this syllabus during the recent annual meeting of the American Bar Association at Miami Beach. The gist of Wright's criticisms were: (1) that the preface did not sufficiently emphasize the "democratic way of life," but stressed the dangers and menace of communism; (2) that the syllabus still contained some references which Wright characterized as "Fabian Socialist preachment"; and (3) that the bibliography was misleading because it contained such writings as those of Rostow and the Overstreets. The

Enclosures 5

1 - Mr. DeLoach
1 - Mr. Sullivan

HLE:phg (5)

SEP 23 1965

CONTINUED - OVER

15 SEP 23 1965

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committee, on getting advance notice of Wright's feelings, invited him to participate in a full discussion of his criticisms with the entire committee. The result of this discussion was that Wright agreed he would be satisfied if the committee added an amendment to the preface which would place additional stress on the equal importance of a thorough understanding and teaching of democracy in any course and further if there was an additional caution inserted to stress the fact that the bibliography is intended to be a balanced rather than a one-sided list of reference works. The committee agreed and has already taken steps to fulfill its promises. Wright even refers to this in the last paragraph of his letter and states that if the committee fulfills its expressed promises adequately he "will not personally make further fights against" the syllabus, but he tells Nichols in the letter "there is no reason whatever why any one else should hesitate to speak forthrightly and sincerely, but not in carping criticism, and expose it for what it is -- a lot of trash that in the last analysis is a help and not a deterrent to the Socialists."

It is impossible to fathom what Wright's state of mind must be. I was present in the committee meeting. He was given full opportunity to speak his piece and he certainly wasn't shy about it. I heard the agreement reached and it appeared to completely end the matter. The only conclusion I can reach is that Wright must be in "someone else's pocket" and having gone back home he has been importuned by some of the [redacted] or other ultra-right groups to again open this issue.

The fact of the matter is that his criticisms were substantially without basis and the committee was leaning over backwards in trying (unsuccessfully it now appears) to appease him.

This Teacher Training Syllabus is an excellent product. It is not soft on communism. It does not make any apologies for Fabian socialism. It clearly states in its preface that any proper course in communism in schools, colleges or universities must consist of instruction on the contrast between communism and liberty under law. It quotes the Director in the preface as stating: "A free society depends for its vitality and strength upon the vigor and patriotism of its individual citizens. Knowledge of Communism - the challenge of our age - and an appreciation of our American heritage will enable us to discipline ourselves for the hard decisions, the responsible judgments, the dedication, and the sacrifices which will have to be made to insure the continued existence of our nation and the perpetuation of freedom itself." It further continues, "Moreover, since considerations of time and budget made impossible the preparation of an encyclopedia on all aspects of the contrast between communism and our way of life, the committee recommends that, where feasible, this syllabus be used in conjunction with ... 'Sources of Our Liberties.'" (Refers to a compendium of subject prepared by the ABA Committee on American Citizenship.)

 SEE NEXT PAGE

The very first part of the syllabus text is entitled, "Democracy and Communism: The Challenge of Contrasting Alternates."

The bibliography lists 328 separate works including both of the Director's books as well as the Director's "best seller" reprint from the Harvard Business Review "The U. S. Businessman Faces the Soviet Spy." Certainly the bibliography must refer the reader to works which communists would cite if they were debating the topic because the teacher should by all means be aware of the enemy's tools.

The syllabus was carefully reviewed by the Domestic Intelligence Division and all recommended revisions, clarifications and amendments were incorporated therein.

A letter dated 8/24/65 from Committee Chairman Morris I. Leibman addressed to past President of the ABA Lewis F. Powell, Jr., indicates that Leibman has authorized committee members Admiral William Mott and L. B. Nichols to make their recommendations on what, if anything, is to be done concerning Wright's letter. L. B. Nichols is the committee member who has largely represented the committee in negotiations with Wright in the past because of his acquaintance with him and Bureau files also reflect that L. B. Nichols has had some controversial correspondence with [redacted] in the past concerning the Overstreets. b6 b7C

RECOMMENDATION

That this memorandum and the attached letter from Wright be referred to the Domestic Intelligence Division for any views it might have concerning Wright's criticisms. Any such views submitted, after approval, can be made available to me for appropriate handling with the ABA committee.

Leibman, Williams, Bennett, Baird and Minow

MORRIS I. LEIBMAN
D. B. WILLIAMS
RUSSELL O. BENNETT
RUSSELL M. BAIRD
NEWTON N. MINOW
LAURENS G. HASTINGS
GEORGE W. K. SNYDER
JOHN H. ROCKWELL
GALE A. CHRISTOPHER
RICHARD H. PRINS
GEORGE T. BOGERT
DAVID P. LIST
JULIAN R. WILHEIM
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CABLE ADDRESS "CROLEX CHICAGO"

OF COUNSEL
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DONALD A. MACKAY
LEONARD A. SPALDING III
WILLIAM P. COLSON
DAVID S. MANN
THOMAS H. BALDIKOSKI
JAMES L. MAROVITZ
WILLIAM L. KELLEY

b6
b7C

August 24, 1965

Lewis F. Powell, Jr., Esquire
Electric Building
Richmond, Virginia

Dear Lewis:

Admiral Mott called me today concerning Mr. Loyd Wright's letter of August 20 addressed to Mr. [redacted] a copy of which was sent to all Committee members.

I have authorized Bill Mott and Lou Nichols to make their recommendations on what, if anything, is to be done in this respect.

Warmest regards.

Sincerely,

Morris I. Leibman

MIL:j

cc: Committee Members

94-1-367-1994

ENCLOSURE

LAW OFFICES OF
WRIGHT, WRIGHT, GOLDWATER AND MACK
SUITE 502 ROWAN BUILDING
458 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013
TELEPHONE 626-1291

LOYD WRIGHT
S. EARL WRIGHT
AUGUSTUS F. MACK, JR.
RICHARD M. GOLDWATER
JOHN H. RICE
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DONALD A. DEWAR
ANDREW J. DAVIS, JR.
RODNEY R. BUCK
KENNETH R. CARROLL
DAVID GORTON
GEORGE E. TOWERS

LOYD WRIGHT, JR. (1919-1964)

BEVERLY HILLS OFFICE
120 EL CAMINO DRIVE
BRADSHAW 2-3494

CABLE ADDRESS WRIGHTLAW

PLEASE ADDRESS REPLY TO
LOS ANGELES OFFICE

b6
b7C

August 20, 1965

Mr. [redacted]
[redacted]
Atlanta, Georgia 30318

Dear Mr. [redacted]

Thank you for your letter of August 18th. I think you will be rendering a public service if you disseminate the pamphlets, though I would like you to know that I spent 2 1/2 hours with the Committee at Miami, and it is their position that the mandate of the House of Delegates simply vests in the Committee the phase of pointing out the Communist philosophy and activities.

I have not had a chance to examine the mandate, but the Committee promised that they would insert on the fly-leaf the statement that the piece should not be used except in conjunction with a treatise gotten out by the American Bar Association on "Americanism".

Personally I would not accept an appointment to present a book that is supposed to confront Communism unless a part of the assignment included first a presentation of the basic principles of our republican form of government; a dissertation on the freedoms we enjoy such as our freedom of religion; the strongest possible presentation of free enterprise and our rights under the Fifth Amendment to own property; a strong historical background on the betrayal of our country by such as Hiss, Morgenthau, Hopkins, Dexter White, etc. etc., and a clear statement that where such Fabian Socialists as Overstreet, Hans Morgenthau and Rostow are cited as desirable reading, that they are Fabian Socialists, the full brother of Communism, and are part of the gang that has taken our beloved country down the Socialistic stream since the advent of a man called Roosevelt, and the infiltration of our government by Felix Frankfurter, a disciple of Keynes and Laski.

Of course, for lawyers to publicize a book which in the Introduction by Dr. Walker states that "there is already adequate material on our democratic way of life" indicates a complete lack of the purpose, as I understand it, of the piece.

94-1-369-1994

ENCLOSURE

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

Memorandum

Tolson
Belmont
Mohr
DeLoach
Casper
Callahan
Conrad
Felt
Gale
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

TO : Mr. A. H. Belmont

DATE: September 8, 1965

FROM : W. C. Sullivan

SUBJECT: AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON EDUCATION AGAINST COMMUNISM; CRITICISM OF TEACHER TRAINING SYLLABUS BY LOYD WRIGHT

Memo, Mr. H. L. Edwards to Mr. Felt, 9/2/65, captioned as above, requested the views of the Domestic Intelligence Division concerning Loyd Wright's criticism of a recently published Teacher Training Syllabus prepared under the auspices of the American Bar Association Standing Committee on Education Against Communism. Wright is a past president of the American Bar Association and is now a California delegate to its House of Delegates. Among other carping criticisms, Wright characterizes the syllabus as "a lot of trash."

The syllabus shows the contrast between communism and democracy. Its preface quotes the Director and its bibliography includes "Masters of Deceit" and "A Study of Communism," as well as the Director's article, "The U. S. Businessman Faces the Soviet Spy." Nowhere is there a more devastating condemnation of communism and a more eloquent defense of democracy than in the Director's writings.

Bufiles indicate that Wright is an extremely conservative, partisan, dictatorial, and difficult individual. He appears to be running true to form in his petty criticism of the syllabus. Because of his extremist outlook and attitude, he is not qualified to pass critical judgment on this document, and it is quite obvious that he does not know what he is talking about. I firmly believe that Wright's unfounded criticism should be ignored and that no time should be wasted in trying to appease him.

RECOMMENDATION:

REC-76 94-1-3659-1995

That this memorandum be referred to the Inspection Division for appropriate handling.

1 - Mr. Belmont
1 - Mr. Felt
1 - Mr. DeLoach
1 - Mr. H. L. Edwards
1 - Mr. Sullivan
1 - Section tickler
1 - Mr. Garner

RSG:df
(8)

EX-101

SEP 23 1965

SEP 23 1965

UNRECORDED COPY FILED IN 62-109172-1

Now one takes Wright seriously. He is an ego-maniac.

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

Memorandum

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Holmes
Gandy

b6
b7C

TO : Mr. Gale

DATE: 9/16/65

FROM : W. V. Cleveland

SUBJECT: SPECIAL TOUR, Foreign Representatives Attending "World Peace Through Law" Conference Washington Hilton Hotel Washington, D. C.; 9/15/65

[redacted] personal secretary to the Attorney General, telephoned the Tour Control Unit, Crime Records Division, 9:30 a.m., 9/15/65, requesting that two Special Agents go to the Attorney General's Office to conduct an FBI tour for about thirty foreign representatives from various countries attending the "World Peace Through Law" Conference. By arrangements made by Miss [redacted] with the Tour Control Unit, the visiting foreign representatives were met by SA [redacted] a French speaking Agent, and SA [redacted] at 10:30 a.m., 9/15/65, at the Office of the Attorney General and were taken on special tour of FBI Headquarters. SA [redacted] conducted the tour for the French speaking visitors, and SA [redacted] handled the tour for the others. The tour followed a conference by members of the group with the Attorney General. A representative of the United States Information Agency as well as several students of United States colleges taking part in the "World Peace Through Law" Conference were present.

The foreign visitors showed enthusiastic interest in the FBI and its work and were very complimentary.

ACTION:

This memorandum should be directed to the attention of the Crime Records Division.

REC-32

94-1-362-1996

EX-103

16 SEP 21 1965

1 - Mr. Belmont
1 - Mr. DeLoach
1 - Mr. Gale
1 - Mr. Cleveland
1 - Mr. Stapleton
1 - Mr. Warren

WWW:amk
(7)

57 SEP 24 1965

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

Memorandum

Tolson
Belmont
Mohr
DeLoach
Casper
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Conrad
Felt
Gale
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

TO : Mr. Felt

DATE: August 17, 1965

FROM : H. L. Edwards

SUBJECT: AMERICAN BAR ASSOCIATION
88th ANNUAL MEETING, MIAMI BEACH, FLORIDA
STANDING COMMITTEE ON THE BILL OF RIGHTS
PROPOSED HANDBOOK FOR LAW-ENFORCEMENT OFFICERS

At the 88th Annual Meeting of the American Bar Association at Miami Beach, the Standing Committee on the Bill of Rights submitted its report to the House of Delegates summarizing its activities for the preceding year. One of its major proposals was the formulation for the use of law enforcement officers of a handbook containing instructions on how to avoid violations of the provisions of the Bill of Rights. The committee mentioned that it had met with a representative of the Attorney General to learn of areas where practices sometimes prevail in which there are infringements on the provisions of the Bill of Rights. The committee also reported it conducted a survey of state police officers in all 50 states and the results were "eye opening" in that although some states tried to cover such topics in lectures to their officers, "not a single police manual was found that even set forth the text of the Bill of Rights"; that many manuals explained the Law of Arrest, some covered Searches and Seizures, one gave a good treatment of Due Process, but they found none which discussed the right to counsel or trial by an impartial jury. The committee, therefore, submitted to the House of Delegates a proposed handbook which will take the form of a "handsome, pocket-sized, 16-page booklet designed to be easily read and understood by police officers in large and small communities in all sections of the country." The committee reported it tried to reflect a sympathetic understanding of the problems of police work.

The text of the proposed handbook was obtained and is attached. The committee plans to postpone the actual publication of the handbook until after January, 1966, in order to permit the various committees who are working on related subjects to indicate any revisions they may think desirable. Specifically, the committee wants to have the benefit of the observations of the Lumbard Committee on Minimum Standards for Criminal Justice. The Criminal Law Section of the American Bar Association will also want to look at this proposed handbook. REC 45 94-1-369-1997

RECOMMENDATION: That the proposed handbook be reviewed by the Training Division and all criticisms, including any proposed additions, deletions or amendments be referred to me so that I might have corrective action taken through proper channels in the American Bar Association.

9 SEP 27 1965

Enclosure

1 - Mr. Casper
1 - Mr. DeLoach

HLE:mbk
(5)

ENCLOSURE

North Seymour, Jr. was assigned the task of formulating and submitting to the committee the contents of such proposed handbook.

At the Washington meeting in May, President Lewis Powell, Jr. met briefly with the committee and considered with us the scope of the work of our committee and correlation of its duties with the various other committees and sections of the Association. By request made to Attorney General of the United States, the Honorable Nicholas deB. Katzenbach, his Assistant Deputy Attorney General, the Honorable Ernest C. Freisen, Jr., met with members of the committee and recommended, as a result of the experience of the office of the Attorney General, areas in which the committee might give attention where practices sometimes prevail in which there are infringements on the provisions of the Bill of Rights. Whitney North Seymour, Jr. presented a draft of the proposed handbook for law enforcement officers, which is hereafter set out as a part of this report. The committee considered a program of activities for the year 1965-1966, and decided to meet at appropriate times during the Annual Meeting of the Association in Miami in August further to discuss and agree upon the work the committee will undertake next year.

II.

A Primer and Handbook on Bill of Rights

Additional substantial progress was made during the year in the formulation of some of the most essential facts about the Bill of Rights,

AMERICAN BAR ASSOCIATION

REPORT OF STANDING COMMITTEE ON BILL OF RIGHTS, 1964 - 1965

I.

General Activities of the Committee

Sessions of members of the committee were held in New Orleans during the Mid-Year Meeting in February, 1965, and in Washington, D. C. on May 20 and 21, 1965. In New Orleans we considered the methods by which the report of the committee containing the result of the Study on Fair Trial made in 1963-1964 could be given more than the usual circulation. That part of the report of the committee was reproduced and furnished members of the Special Committee for the Formulation of Minimum Standards for Criminal Justice of which the Honorable J. Edward Lumbard, Chief Judge, United States Court of Appeals, Second Circuit, is chairman, and the members of the Advisory Committee on Fair Trial and Free Press of which Honorable Paul C. Reardon, Justice of the Supreme Judicial Court of Massachusetts is chairman. That part of our report was also furnished a number of other members of committees of the Association and others who asked for copies of it.

The committee also approved a proposal that we formulate for the use of law enforcement officers a handbook containing instructions on how to avoid violations of the provisions of the Bill of Rights. Whitney

which may be proposed for distribution as a Primer. A far more comprehensive and authoritative work for use as a General Handbook on the Bill of Rights is also in preparation. The committee will present the result of its studies and work on this project to the House as soon as they are completed.

III.

A Handbook for Law Enforcement Officers

There has been completed by the committee and submitted to a number of officials of the Association a proposed Handbook for Law Enforcement Officers. This proposed handbook will take the form of a handsome pocket-sized sixteen page booklet designed to be easily read and understood by police officers in large and small communities in all sections of the country.

It is believed that this handbook will fill a substantial gap in the education of local police officers. Our committee conducted a survey of state police officers in all fifty states to determine the adequacy of coverage of the Bill of Rights in operating manuals. The results were eye opening. Although some states responded that they tried to cover such topics in lectures to their officers, not a single police manual was found that even set forth the text of the Bill of Rights. Many manuals explain the Law of Arrest, some cover Searches and Seizures, and one (Arizona) gave a good treatment of Due Process.

We have not found anywhere a discussion of the right to counsel or to trial by an impartial jury. A practical police officer's guide to the Bill of Rights and its bearing on law enforcement work appears to be very much in order.

We have deliberately tried to keep our text as short and simple as possible. We have also tried to reflect a sympathetic understanding of the problems of police work. The most useful contribution we believe we have made is the series of "recommended practices" set out as practical how-to-do-it guides. If we can help teach police officers to follow these practices, we believe we will have contributed materially to the practical implementation of the Bill of Rights in our time.

The Committee plans to postpone actual publication of the handbook for police officers until after the beginning of next year, in order to permit the various committees who are working on related subjects to indicate any revisions they think may be desirable in the substantive recommendations. We are particularly anxious to have the benefit of the work currently being done by the Special Committee for the Formulation of Minimum Standards for Criminal Justice, whose chairman is Chief Judge J. Edward Lumbard of the Second Circuit Court of Appeals. In the meanwhile, if any other officers, committees or members of the Association have any suggestions on the text of the handbook which they believe would be useful to our committee, we would welcome them.

The complete text of the proposed handbook follows:

FOREWARD

"A Policeman's lot is not a happy one"

(Gilbert & Sullivan, "Pirates of Penzance")

There probably are times in every police officer's life when he wonders why he ever took the job in the first place. The community expects him to risk his life in preserving the peace and safety of its citizens, and then proceeds to throw roadblocks across his path to make his job as difficult as possible. Instead of gratitude for solving a difficult crime, he is often bombarded with criticism from citizen groups, the courts and the press. Vocal civil rights groups seem to keep cropping up across the country for the primary purpose of making the policeman's lot unhappy.

This booklet is designed to relieve some of that unhappiness by giving police officers - old timers as well as the newest man on the force - an up to date statement on recent Supreme Court rulings, and a practical set of suggestions on how to see that the Bill of Rights is put into practice in day to day police work. The limitations on police work imposed by the Bill of Rights are really based on common sense, and we believe that if rights are guaranteed by that document, it will make the police officer's job much simpler and at the same time help to ensure that the rights themselves are protected.

President, American Bar Association
1964-65

President, American Bar Association
1965-66

Standing Committee on the Bill of Rights

GENERAL SCOPE OF THE BILL OF RIGHTS

The Bill of Rights, comprising the First Ten Amendments of the Constitution of the United States, was first proposed to the U. S. Congress in the spring of 1789 by representative James Madison of Virginia. After extensive debate, the Amendments were approved by Congress in late summer and then sent to the States for ratification. The requisite number of states had ratified the Amendments by 1791, and they became effective as the law of the land on December 15th of that year.

Although the Bill of Rights itself was written as a curb on the activities of the Federal Government, many of its principles were later made binding on State and local law enforcement officers through the operation of the due process clause of the Fourteenth Amendment, particularly the provisions of the First, Fourth, Fifth and Sixth Amendments. In addition, many of the provisions of the Bill of Rights have been incorporated in the constitutions of the individual States, so that they are doubly guaranteed.

The principal guarantees of the Bill of Rights involved in the work of law enforcement officers, together with a practical common sense description of how police officers can ensure that those rights are protectured, are described herein. This booklet is being distributed to law enforcement officers throughout the country in the belief that responsible officers will respect the guarantees of the Bill of Rights because they recognize that they must obey the law themselves. It is also distributed with the realization that compliance with the Constitution's mandates by police officers is a protection against public criticism and against possible nullification of enforcement activities by the courts.

The following pages contain references to twelve important Supreme Court decisions, most of them handed down in the last 2 or 3 years, passing on important Constitutional questions in the context of practical law enforcement situations. Any law enforcement officer interested in learning more about any of these rights and the way they are construed can probably find copies of these decisions on the shelves of any nearby law library. The opinions themselves make interesting and instructive reading.

FREEDOM OF SPEECH AND ASSEMBLY

". . . or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(First Amendment)

The Supreme Court has held that the rights guaranteed by the First Amendment also impose limitations on state and local officers through the Fourteenth Amendment. Law enforcement officers are prohibited from using the power of arrest for breach of the peace or similar offenses as a means for interfering with peaceful picketing, marching, singing or similar demonstrations. In Edwards v. South Carolina, 372 U. S. 229 (1963), the Supreme Court recently reversed a conviction of a group of high school and college students engaged in a civil rights protest on public property, on just these grounds.

Recommended practice:

Pickets and other demonstrators who are reasonably orderly and who do not engage in physical assault or otherwise create actual violence or improper interference with the rights of others are entitled to express their views and present their grievances without police interference. This principle is fundamental to the notion of our Founding Fathers that a democracy survives best when unpopular ideas can be freely expressed in public, rather than confining them to secret, underground conspiracies which threaten the security of our country. Annoying as such demonstrations can be, particularly when accompanied by jibes and jeering at law enforcement officials, police officers will actually help strengthen our country by waiting out such demonstrations with courtesy, tact and patience. They will thereby be obeying the law themselves, while permitting others to exercise probably the most basic right of our democracy.

SEARCHES AND SEIZURES

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."
>
> (Fourth Amendment)

Strict limitations on the conduct of searches by police officers were extended to all State as well as Federal courts in the 1961 decision of the Supreme Court in Mapp v. Ohio, 367 U. S. 643. That case involved the raid on a home in Cleveland by police officers investigating a report that a suspect was in hiding there. The police officers forced their way into the house without a search warrant, after a refusal by the owner to admit them voluntarily. A subsequent conviction based on obscene material seized during the officers' search was reversed by the Supreme Court, which held that the same limitations of the Fourth Amendment finding on Federal officers also apply to State and local law enforcement officials.

Recommended practice:

Detailed local police procedures should be established to cover practices in connection with searches of persons, homes and vehicles. The general principle to be followed is that no search and seizure of a person or premises should be made by any police officer except in strict compliance with a proper search warrant, or incidental to a valid arrest, or with the consent of the owner (which should be obtained in writing, if possible). In obtaining search warrants, police officers should be careful to state facts in their supporting affidavits to establish probable cause, and not merely their personal conclusions (Aguilar v. Texas, 378 U. S. 108, 1964). Officers should be careful to limit their searches made at the time of arrest to the immediate surrounding area, and when executing a search warrant should comply with its terms precisely. Any other practice violates the Bill of Rights and will render any results of the search inadmissible in evidence.

DUE PROCESS OF LAW

"No person shall . . . be deprived of life, liberty, or property without due process of law."

(Fifth Amendment)

From the police officers' point of view, apart from the limitations on the power of arrest (not attempted to be covered in this handbook), the most significant aspect of the Fifth Amendment guarantee of due process (made applicable to State and local law enforcement officers through the Fourteenth Amendment) is the restriction it imposes on the questioning of suspects. A number of recent decisions of the Supreme Court have struck down convictions where involuntary confessions have been offered by the prosecution. The Supreme Court has said that the controlling question is solely the circumstances under which a confession has been obtained. The Court has held that it does not matter whether the confession is true or false, or even whether there is sufficient additional evidence aside from the confession to support a conviction. The basic reasoning of the Supreme Court in striking down involuntary confessions is that the taking of such confessions constitutes a violation of law by the police officers involved and that illegal methods will not be permitted in the administration of justice. Jackson v. Denno, 378 U. S. 368 (1964).

It is difficult to establish any fixed rule as to what determines whether a confession will be regarded as "involuntary" or not. Generally speaking, the matter is one to be judged on the basis of common sense under the particular circumstances. In Jackson v. Denno the Supreme Court dealt with a confession obtained during interrogation of the suspect in a hospital in New York after the administration of drugs. In Rogers v. Richmond, 365 U. S. 534 (1961), the Supreme Court ordered a new trial because a confession had been taken after the chief of police in New Haven, Connecticut, had threatened to bring in the suspect's ailing wife for questioning. In Mallory v. U. S., 354 U. S. 449 (1957), the Supreme Court overturned a conviction based on a confession in the District of Columbia obtained in connection with the use of a lie detector test and questioning extended over a 10-hour period.

Recommended Practice:

Common sense and good judgment will usually avoid any serious problem about a valid statement taken from a suspect. The type of police conduct which is most likely to create problems includes questioning for unreasonable periods of time (anything more than three or four hours is likely to run into difficulty); any suggestion of physical force or threat of bodily harm; promises of a light sentence or other favored treatment; failure to provide adequate food or rest at normal meal and sleeping hours; and refusing to permit the suspect to consult with his family or friends if requested. Obviously, questioning during the course of an investigation must be complete and searching, and so long as it is carried out in good faith it is not likely to generate problems. The moment a police officer tries to be "smart" in the way he handles a suspect during questioning is the moment he runs the risk that any confession will be later voided in court.

Related to this problem of taking confessions under proper circumstances is the requirement that any person under arrest be arraigned without unnecessary delay. Even an otherwise valid confession may be jeopardized by failure to comply with this requirement. (See McNabb v. U. S., 318 U. S. 332 (1943).)

TRIAL BY AN IMPARTIAL JURY

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . "
>
> (Sixth Amendment)

The conduct by law enforcement officers in dealing with press media often can adversely affect a defendant's right to trial by an impartial jury. Such conduct usually involves the creation of a climate of unfavorable publicity generated by statements made by police officers themselves or by their subjecting a defendant to press interviews. The disapproval by the Supreme Court of this type of conduct was expressed in Rideau v. Louisiana, 337 U. S. 723 (1963). In that case,

the Supreme Court reversed a conviction for first-degree murder in Louisiana on the ground that the defendant had been denied a fair trial because he had been interviewed by the Sheriff before television cameras following his arrest. The Court severely criticized the conduct of the law enforcement officer in permitting such televised interview of a defendant not represented by counsel, and likened the procedure to a "kangaroo court".

Throughout the country there has been increasing concern expressed by judges and others over the improper publicizing of criminal proceedings and the part that the law enforcement officials take in the process. The Warren Commission Report on the Assassination of President Kennedy included a special section condemning the public dissemination of "evidence" concerning the guilt of Oswald by police and prosecuting officials. Further restrictions on the release of information prejudicial to a fair trial can be expected in the future.

Recommended practice:

Law enforcement officers obviously have a responsibility to the public to keep them informed on matters relating to the conduct of their office. The fact of the commission of crimes, the fact of the apprehension of suspects, and basic identification data are all proper subjects for public disclosure. On the other hand, a defendant's prior criminal record, the fact that he has made a confession, expressions of opinion as to the defendant's guilt or the nature and extent of the evidence against him are all items which can adversely affect the partiality of future trial jurors. The release of such information, except during the course of judicial proceedings in the courtroom, should be avoided. In addition, no defendant should be made available for interview by representatives of press media while in police custody unless accompanied by counsel.

RIGHT TO COUNSEL

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."
>
> (Sixth Amendment)

The decision as to when a subject must be advised of his right to counsel was left uncertain by the decision of the Supreme Court in Escobedo v. Illinois, 378 U. S. 478 (1964), a 5-to-4 decision reversing a conviction based on a statement made by a defendant who had been denied the right to consult with his counsel. That case makes it clear that whenever a suspect being questioned for the purpose of obtaining a confession actually requests the right to consult with his lawyer, or the lawyer requests the right to consult with his client, the request must be granted. Any statement taken from the suspect after refusing to grant such a request will generally be inadmissible in evidence.

The more difficult question presented by the Escobedo decision is whether police officers have an affirmative duty to advise a subject that he has a right to consult with his lawyer and that he has a right to remain silent. As this pamphlet is being prepared (summer of 1965) a number of lower Federal and State courts in various jurisdictions have since held that police officers must give this warning under circumstances of extended questioning of a suspect designed to elicit a confession.

Of course, once counsel has appeared to represent a defendant, no subterfuge should be used to attempt to elicit admissions without the knowledge or consent of counsel, such as using a co-defendant armed with a hidden transmitter to ask incriminating questions. Massiah v. U.S., 377 U. S. 201 (1964).

Recommended practice:

Before any formal statement is taken from a suspect for the purpose of recording his admissions for use in court, he should be given a formal warning on the record, whether incorporated in a written statement or dictated to a stenographer, of his right to counsel and of his right to remain silent. It has been the standard practice of the Federal Bureau of Investigation for many years to advise a suspect at the commencement of any written interview or statement substantially as follows:

> "I want to advise you that any statement you make should be entirely voluntary. You are not required to make a statement and any statement you do make may be used against you in a court of law. I also want to advise you that you have the right to be represented by counsel if you wish."

Such a statement is good practice and will provide good insurance against later challenges to a confession on the ground that it was taken in violation of the defendant's constitutional rights. If the suspect then states his desire to consult with counsel, the interrogation should be suspended until he has had an opportunity to do so. If he says that he wants a lawyer but cannot afford one, steps should be taken to see that counsel is provided. (See Gideon v. Wainwright, 372 U. S. 335 (1963).)

EQUAL PROTECTION OF THE LAWS

". . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

(Fourteenth Amendment)

Laws must be enforced with an even hand. It is improper for police officers to use the law in a selective fashion designed intentionally to discriminate against any particular individual or group. Random enforcement of the law, made necessary because of staff limitations, is entirely proper. Selective enforcement, as long as it is done fairly and is designed to set a proper example for the community, is also proper. But when public officials enforce a law "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances", the prosecution is improper and subject to dismissal. Yick Wo v. Hopkins, 118 U. S. 356 (1886). There have been a long string of later cases following the principle in this landmark decision.

Recommended practice:

The power of conducting investigations and instituting prosecutions is a public trust. Improperly used, it can ruin the lives of individuals. Police officers have a duty to themselves and their community to enforce the laws fairly and evenly, not on the basis of any political motivation, personal dislikes, or animosity toward any particular race or group. Vengeance, publicity seeking, or community tensions should never be the basis for making arrests or instituting criminal investigations.

APPENDIX

THE DEFENDANT'S POINT OF VIEW

Law enforcement officers can also gain an appreciation of the rights of individuals from an understanding of what persons liable to arrest expect in the way of treatment. A number of different agencies have circulated leaflets advising the general public as to their rights if arrested. The following are excerpts from one such leaflet distributed in Texas, and presents a clear picture of what arrested persons are being told what they should expect in the hands of police officers.

IF YOU ARE ARRESTED . . .

WHAT ARE YOUR RIGHTS?

The courts have defined an arrest in a criminal case as the apprehending or detaining of a person in order that he be held to answer for an alleged or suspected crime.

If you are arrested, you are entitled to the protection of certain rights under our laws and the Texas and Federal Constitution. The police officer or deputy sheriff who may arrest you has a job to do and deserves your respect and cooperation. He stands for law and order without which our community would be an asphalt jungle. He must perform his duties, however, within the framework of the law. And along with your rights, you should know your duties and obligations. Here are the answers to some questions which concern your rights-and duties-as a person under arrest. Read Them Carefully.

I. THE ACT OF ARREST

WHAT IF YOU ARE INNOCENT?

Even if you know you are not guilty, it is a crime to resist an officer who arrests you lawfully. Respect him . . . he is doing

his duty and has no authority to decide the merits of your case. Do not resist arrest or be disorderly. If it turns out that you have been arrested illegally, you may be able to sue the officer. But remember . . . if the arrest was a lawful one, the fact that you are innocent does not give you a right to sue for damages. The following answers explain your rights whether you are innocent or not.

HOW IS AN ARREST UNDER A WARRANT MADE?

If a police officer has a warrant for your arrest, he may use all reasonable means necessary to carry out his duty to arrest you. However, no greater force may be resorted to than is necessary. At the time of the arrest, the officer must tell you under what authority the arrest is made, and upon your request, he must show you the warrant. Texas law states that in case of a felony, the officer may break open your door or window to make your arrest if he has given you notice of his authority and purpose, and you have denied him admittance.

II. YOUR RIGHTS AT THE POLICE STATION

WHAT HAPPENS AFTER YOU ARE ARRESTED?

If you are arrested by a police officer, you are taken to the police station where you are "booked". You may be fingerprinted and photographed. You will be given a receipt for all money and property taken from you when you are booked.

DO YOU HAVE TO ANSWER QUESTIONS?

It is your right under the Constitution to refuse to say anything that may be used against you later. After identifying yourself, you do not have to answer any questions or sign any paper about your alleged crime. If any force or threats are used against you, report it to the judge, the prosecuting attoreny and your own lawyer. You should also report any bruises or injuries you suffered after your arrest. The promise of a policeman to help you or to intervene with the court, in exchange for a confession, is not binding.

CAN YOU NOTIFY ANYONE OF YOUR ARREST?

You are entitled to make one telephone call within city limits to tell your family, a friend, or your lawyer about your arrest. Request this privilege at your earliest opportunity.

WHAT ABOUT GETTING RELEASED ON BAIL?

You have the right under the Texas Constitution to obtain your release from jail by posting a bail bond (unless you are being held for a death penalty offense). The amount of bail is fixed by the court, magistrate or officer taking the bail, but it must not be excessive according to the Constitution.

III. YOUR RIGHTS IN COURT

WHEN DO YOU GO BEFORE A JUDGE?

After arrest and booking, you must be taken before a judge without unnecessary delay. What is a reasonable time depends on the facts of each case. If you are arrested at night when a judge is not available, or if you are in a state of intoxication, a few hours delay is not considered unreasonable.

IV. WHAT IF YOU CAN'T AFFORD A LAWYER?

At the present time in Texas, if you are charged with a misdemeanor, the trial judge is not required to appoint an attorney to represent you, nor is he so required in non-capital felony cases (where the death penalty may not be imposed). In capital cases, where the defendant shows he is too poor to employ his own attorney, the judge must appoint an attorney to represent him. A recent U. S. Supreme Court decision indicates that the states have an obligation to provide free counsel in all criminal trials. This new requirement is bound to have an effect in Texas, possibly resulting in the legislative creation of a Public Defender as a counterpart to the District Attorney.

IF YOU ARE ARRESTED

YOU HAVE A RIGHT TO . . . .

- Get a lawyer.
- Say nothing that can be held against you.
- Notify family or friends.
- Apply for bail.

DO NOT . . . .

- Resist a policeman.
- Talk back or be disorderly.
- Refuse entry for a lawful arrest.

IV.

Status of Constitutional Liberties as Reflected in United States Supreme Court Decisions*

A. Constitutional Rights and Criminal Procedure

(1) Retroactive Application of New Constitutional Decisions.

The most important decisions of the year in the field of criminal procedure were Linkletter v. Walker, 85 S. Ct. 1731 (June 7, 1965) and Angelet v. Fay, 85 S. Ct. 1750 (June 7 1965), holding that the June, 1961 decision in Mapp v. Ohio, 367 U. S. 643, did not compel the granting of federal habeas corpus to state prisoners whose convictions had become final before Mapp. The Court has never before refused to apply an expanded interpretation of the Bill of Rights retroactively to prisoners convicted at an earlier time. Mr. Justice Clark's opinions for the Court emphasized that the primary purpose of the exclusionary rule was to deter unlawful police conduct--a purpose which could not conceivably be advanced by retroactive application to cases which had become final at the time of the adoption of the rule. Moreover, the requirement that the evidence be excluded had no bearing on the accused's guilt or innocence. The court has, of course, particularly in the three terms of Court just past, imposed new Constitutional procedural requirements on the states---particularly with reference to the right to counsel and the privilege against self-incrimination. Many

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* Once again, the Committee expresses its appreciation to Professor William Cohen (School of Law, U. C. L. A.) for having prepared this portion of our report.

implications of a revolution in Constitutional doctrine with reference to application of the Bill of Rights to the states remain to be marked out. Shedding additional light on the question whether other new procedural rights would be given prospective or retrospective protection was the court's distinction of the coerced confession where the Court has, without question or discussion, applied retroactively new and more expansive standards of "coercion." The Court noted that the general principle excluding coerced confessions had predated the confessions and the convictions in each case, and that coerced confessions are excluded from evidence for a complex of reasons including potential unreliability of the evidence. The Court pointed out that "once the premise is accepted that we are neither required to, nor prohibited from applying a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 85 S. Ct. 1731 at 1738. "Weighing the merits and demerits in each case" of claimed retrospective application of new procedural rights is apt to claim considerable of the Court's attention in the next few years. Justice Douglas joined Justice Black in dissent, arguing that no state had an interest in keeping prisoners in jail as a result of unconstitutional conduct by state officials.

(2) Searches and Seizures.

The validity of a search without a search warrant will usually turn upon the contention that the search was incident to a valid arrest. Where, as is usually the case, the arrest was likewise without warrant, the validity of a search incident to the arrest will depend in turn upon the validity of the arrest. In Beck v. Ohio, 85 S. Ct. 223 (Nov. 23, 1964), the Court held, without much apparent controversy, that the constitutional validity of an arrest by a state officer depended upon probable cause to make the arrest. In finding the record in this case insufficient to support probable cause, however, the Court, quoting from Ker v. California, 374 U. S 23, 34 (1962), indicated that it recognized that investigative and enforcement techniques varied between state and federal law enforcement officials, as well as among the states. In this case, the defendant was found to have "clearing house slips" on his person. The arresting officer testified that he knew that the defendant had a record in connection with gambling, and that in making the arrest he was "operating on information" which he could not divulge. A majority of the Court, speaking through Mr. Justice Stewart, held that if probable cause was to be shown through an informer's tip, it was incumbent upon the prosecution to show more specifically what the informer actually said. Justices Clark, Black and Harlan dissenting, argued that the state court's finding of probable cause was supported by the record.

In Stanford v. Texas, 85 S. Ct. 506 (Jan. 18, 1965), state police officers obtained a search warrant for the search and seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas". Under that warrant, the residence of petitioner, who carried on a mail order book business, was searched. During the four hour search, books and pamphlets comprising 300 separate titles and numerous private documents and papers were seized. The Court held that the warrant under which the search was conducted was of a kind which it was the purpose of the Fourth Amendment to forbid--the general warrant which James Otis had denounced. The Court noted that the constitutional requirement that a search warrant particularly described the things to be seized would be most strictly enforced where, as here, the things to be seized were not physical contraband but literary material protected by the First Amendment.

United States v. Ventresca, 85 S. Ct. 741 (March 1, 1965), presented the question of the sufficiency of an affidavit for issuance of a search warrant against the contention that the affidavit did not adequately show "probable cause". The court had previously held that search warrants may be issued on the basis of reliable hearsay evidence. Jones v. United States, 362 U. S. 257; Aguilar v. Texas, 378 U. S. 108. In this case, an investigator for the Alcohol and Tabacco Division of the Internal Revenue Service stated that he had reason to believe that an illegal distillery was in

operation, based upon observations made by him "and based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division". The Court of Appeals had found the affidavit insufficient on the ground that the information recited in the affidavit might have been obtained by unnamed Investigators other than the affiant, which in turn might have been based upon hearsay received from unreliable informants. The Cupreme Court held the affidavit sufficient, noting:

> . . . ."affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." 85 S. Ct. at 746.

Justice Douglas and the Chief Justice dissented, arguing that in order to determine whether hearsay sources of information are credible the Court should insist that the source of information in the affidavit be made clear.

One 1958 Plymouth Sedan v. Pennsylvania, 85 S. Ct. 1246 (April 29, 1965), held that unlawfully seized evidence could not be constitutionally used in a forfeiture proceeding. The Pennsylvania Supreme Court had held to the contrary, on the theory that forfeiture proceedings were deemed "civil in nature" under Pennsylvania law. The Court reversed, squarely relying on the holding in Boyd v. United States, 116 U. S. 616, 634 (1886),

that "suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi criminal nature . . . (and) are within the reason of criminal proceedings for all the purposes of the Fourth Amendment . . . "

(3) "Incorporation" of the Bill of Rights.

Pointer v. Texas, 85 S. Ct. 1065 (April 5, 1965), and Douglas v. Alabama, 85 S. Ct. 1074 (April 5, 1965), continued the parade of those provisions of the Bill of Rights " incorporated " into the Fourteenth Amendment by holding that the Sixth Amendment's right to confront and cross-examine witnesses must be made available to a defendant in a state criminal proceeding. The holdings, moreover, put the exclusion of hearsay testimony in criminal trials on a constitutional basis to an extent not yet fully determined. In Pointer, the transcript of a preliminary hearing at which the accused had been unrepresented by counsel was introduced, in part, at the criminal trial. Reversal of the conviction in Pointer might have been based, in the alternative, upon denial of the right to counsel at a significant stage in the proceedings. Douglas, however, rests reversal upon the introduction of a co-defendant's confession against the accused. The co-defendant had been called to the stand by the prosecutor, and claimed the privilege against self-incrimination. In the guise of cross-examination to refresh his recollection, the prosecutor was allowed by the trial judge to read the confession, asking from time to time whether the witness had made those statements. Law enforcement officers then identified the document from which the prosecutor read as a confession made and signed

by the co-defendant. Justices Harlan and Stewart, while they concurred in the result and in the conclusion that defendants had been denied a constitutional right of "confrontation", disagreed, as they have previously, with the Court's theory of "incorporation".

Of particular interest to scholars of constitutional law is the decision in Griffin v. California, 85 S. Ct. 1229 (April 28, 1965), squarely overruling Adamson v. California, 332 U. S. 46 (1947), and holding prosecution and judicial comment on the defendant's failure to take the stand in a criminal trial a violation of the Fourteenth Amendment. However only six states permitted comment---Ohio, New Jersey, Iowa, Connecticut, and New Mexico, in addition to California. And, given last year's decision in Malloy v. Hogan, 378 U. S. 1 (1964), which held the Fifth Amendment privilege against self-incrimination "incorporated" into the Fourteenth, the sole question was whether the rule against comment was a judicially-created rule of evidence or an implicit requirement of the Fifth Amendment. Ker v. California, 374 U. S. 23 (1963); People v. Modesto, 62 Adv. Cal. 452, 42 Cal. Rptr. 417, 398 P. 2d 753 (1965). And that question, before Griffin, had been an open one. See Adamson v. California, 332 U. S. 46, 50 (1947) n. 6. Mr. Justice Douglas' opinion for the court concluded that comment was a penalty imposed for exercising the constitutional privilege. Mr. Justice Harlan, concurring specially, agreed that the Fifth Amendment bars adverse comment by judge and prosecutor on a defendant's failure to take the stand. Mr. Jus-

tice Stewart, joined in dissent by Mr. Justice White, concluded that "The California comment rule is not a coercive devise which impairs the right against self-incrimination, but rather a means of articulating and bringing into the light of rational discussion a fact inescapably impressed on the jury's consciousness." 85 S. Ct. at 1237.

(4) Jury Trial.

The United States Supreme Court has required, in criminal cases involving Negro defendants, that Negroes not be systematically excluded from both grand and petit jury panels. It is common knowledge, however, that in few cases do Negro jurors in fact sit in cases which involve Negro criminal defendants. Swain v. Alabama, 85 S. Ct. 824 (March 8, 1965), involved the very difficult question of the use of peremptory challenges by the prosecutor to remove Negro members of the panel from the trial jury. The Court held that the peremptory striking of Negroes from a particular jury is not a denial of equal protection of the laws, since peremptory challenges are normally exercised on the basis of irrelevant or extra-legal grounds. Swain also argued that there had been a systematic practice in the Alabama county where he was convicted to strike all Negroes on petit jury venires, and thus preclude their service on the petit jury itself. While the Court rejected this claim on the ground that such a systematic process had not been proven, it did state, significantly, that "this claim raises a different issue and it may well require a different answer . . . (W)hen the prosecutor in a

county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance," 85 S. Ct. at 837. Justice Goldberg, joined by the Chief Justice and Justice Douglas, argued in dissent that a prima facie case of systematic elimination of Negroes from trial juries had been made.

In Singer v. United States, 85 S. Ct. 783 (March 1, 1965), the Court upheld the constitutionality of the long-standing rule requiring court and government consent to the defendant's waiver of jury trial in a federal criminal case. Upholding Rule 23 (a) of the Federal Rules of Criminal Procedure, the Court held that neither history nor the demands of a fair trial gave the defendant a constitutional right to trial by court without a jury.

(5) Fair Trial.

In Estes v. Texas, 85 S. Ct. 1628 (June 7, 1965), the Court spoke for the first time on the Constitutional rights of the accused to bar televising of his criminal trial. Judicial Canon 28 of the Texas Bar, unlike Judicial Canon 35 of the American Bar Association, leaves the decision to permit televising and reporting of judicial opinions to the discretion of the trial judge. In Estes' trial for swindling, there was live (and chaotic)

coverage of defense motions to bar cameras and broadcasting, and for continuance. At the trial itself, videotapes of a portion of the proceedings were taken from a camera booth located more discretely to the rear of the courtroom. The exact holding of the reversal, here, of Estes' conviction is subject to some doubt, because all four justices who joined in Mr. Justice Clark's opinion for the Court joined in separate opinions expressing the bases of their concurrence. The Chief Justice's opinion, joined by Justices Douglas and Goldberg, argued for a per se rule banning televising of criminal trials. Mr. Justice Harlan's opinion stressed, however, that the issue presented was no broader than the question whether permitting television was a violation of due process in "a criminal trial of great notoriety." (As a practical matter, it may be doubted whether there will be wide coverage of other trials.) Justices Stewart, Black, Brennan and White, dissenting, argued that there should be no per se constitutional rule, "at least in the present state of the art", and that Estes should not be entitled to reversal of conviction on a record which did not demonstrate he was prejudiced by a televising of the proceeding.

In Turner v. Louisiana, 85 S. Ct. 546 (Jan. 18, 1965), the Court determined a novel issue of procedural due process in criminal cases. Turner had been convicted of murder in a trial during which two deputy sheriffs testified. Later those two deputy sheriffs were among those placed in charge of the sequestered jury, and mingled and conversed with jurors during the three-day trial. The Court held that permitting such close association between key prosecution witnesses and the jury

denied the defendant the right to a verdict based upon the evidence developed at the trial, a right held essential to a fair trial. Justice Clark, dissenting, was unable to find that the practice "reaches federal due process proportions" in the absence of a showing of prejudice.

(6) Miscellaneous cases.

In a novel application of the Due Process Clause, the Court reversed the convictions of Negro attorneys for contempt of a state court. Hold v. Virginia, 85 S. Ct. 1375 (May 17, 1965). The petitioners were Negro attorneys who claimed past harrassment by the trial judge in their representation of civil rights cases. A motion for change of venue in a previous contempt case (apparently never followed up) alleged that the trial judge had acted as "police officer, chief prosecuting witness, adverse witness for the defense, grand jury, chief prosecutor and judge". Petitioners were summarily held in contempt of court on the ground that the language was contempuous of the court. Reversing, the Court held that petitioners had been punished "for doing nothing more than exercising the constitutional right of the accused and his counsel in contempt cases such as this to defend against the charges made". 85 S. Ct. at 1378.

United States v. Gainey, 85 S. Ct. 754 (March 1, 1965), dealt with the sometimes difficult question of when a statutory inference of fact in a criminal statute is permissible. The Court held that the Act of Congress inferring the possession of an unregistered still and the carrying on of an illegal distillery, from the fact of a defendant's unexplained presence at the site of an illegal still, sufficiently rational to satisfy the requirement of due process.

B. Freedom of Speech and Press

(1) Libel and Slander.

As we noted in our report last year, the decision of the Court in New York Times Company v. Sullivan, 376 U. S. 254, may require considerable revision of state libel laws under the command of the First Amendment. In Garrison v. Louisiana, 85 S. Ct. 209, (Nov. 23, 1964), the Court reversed the criminal libel conviction of the District Attorney of Orleans Parish, Louisiana, who had criticized the eight Criminal District Court Judges of the Parish. He had complained in a press conference about "racketeer influences on our eight vacation-minded judges". The Garrison opinion expands from the principles announced in the New York Times case in three significant ways. First, the Court refused to draw a distinction between civil libel involved in the New York Times case and criminal libel involved in Garrison. Historically, criminal libel was aimed at preventing breach of the peace. But, as the Court noted, criminal libel prosecutions have virtually disappeared and, to the extent that they are instituted, serve primarily for the protection of individual reputation. Second, the Court held that truth must, under the Constitution, be an absolute defense. Historically, criminal libel laws limited the defense of truth to utterances published "with good motives and for justifiable ends". The Court reasoned that, where the conduct of public

business by public officials was involved, the interest in protecting private reputation was so overwhelmed by larger public interest that punishment or liability could attach only to knowing or reckless falsehood. In putting to one side those statements "in which the public had no interest" the Court appears to have left room for those cases where damages have been awarded under the rubric of invasion of privacy for true defamatory statements. Third, the Court held that the privileged criticism of public officials includes statements which relate to "anything which might touch on an official's fitness for office". Noting that dishonesty, malfeasance, or improper motivation are germane to fitness for office, even though they may also affect an official's private character, the Court held that the defendant's statements were privileged even if characterized as attacks upon the integrity and honesty of the judges.

After Aaron Henry, a nationally known civil rights worker, was arrested for disturbing the peace, he stated that his arrest was "the result of a diabolical plot" by the County Attorney and Chief of Police of Clarksdale, Mississippi. The latter officials brought civil suit for defamation in the State courts. The Supreme Court, reversing judgments for plaintiffs, held that the instructions to the jury were defective under New York Times Company v. Sullivan and Garrison v. Louisiana, since they permitted the jury to grant recovery without proof of actual malice in the sense of intent to inflict harm through falsehood. Henry v. Collins, 85 S. Ct. 992 (March 29, 1965).

(2) Civil Rights Demonstrations.

Cox v. Louisiana, 85 S. Ct. 453 (Jan. 18, 1965), involved the state criminal convictions of the leader of 2,000 students who had picketed the Louisiana capitol and a nearby courthouse. In one case, convictions for disturbing the peace and obstructing public passages were reversed, with Justices White and Harlan dissenting in part. The disturbing the peace conviction was held to violate constitutional guarantees of freedom of speech and assembly. The Louisiana statute was held to be unconstitutional, both on its face, and as applied, insofar as it prohibited expression strongly opposed by a majority of the community. The conviction for obstructing public passages, also reversed, posed somewhat more serious problems. Mr. Justice Goldberg's opinion for the Court conceded that governmental authorities have a legitimate interest in keeping streets open and available for movement. In this case, however, there was evidence that city authorities had permitted or prohibited parades and street meetings in the past under undefined standards. See Niemotko v. Maryland, 340 U. S. 268 (1951). Justices White and Harlan, dissenting, argued that in the absence of evidence that meetings of such magnitude had been allowed previously on city streets, state authorities were entitled to apply a statute which generally prohibited all obstruction of public streets.

Cox's conviction for picketing a courthouse presented the most difficult problems of all. The Louisiana statute involved prohibited picketing or parading near a courthouse "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty". Cox had conducted picketing of the courthouse to protest the arrest and prosecution of Negro college students for picketing segregated lunch counters. The Court held that the Louisiana law was valid on its face as a "narrowly drawn statute" which promoted the state's legitimate interest in freeing the judicial process from outside control and influence. The Court distinguished earlier cases which had, on constitutional grounds, narrowly limited the power of both state and federal judges to punish for contempt those who published writings critical of judicial proceedings. The Court noted that picketing was not a "pure form of expression", but "expression mixed with particular conduct". See Giboney v. Empire Storage & Ice Co., 336 U. S. 490, 502 (1949). Further, the Court held that there was sufficient evidence that the picketing was intended to influence the pending judicial proceedings, as required by the statute. The conviction was reversed, however, on the narrow ground that the pickets had been given reason to believe that they were not picketing "near" the courthouse, within the statutory definition, when the sheriff and mayor had told demonstrators they could meet across the street from the courthouse.

Cf. Raley v. Ohio, 360 U. S. 423 (1959). Justices Clark and Black joined Justices White and Harlan in dissent. Justice Clark pointed out that nothing in the record implied that Cox had been given permission to occupy the sidewalk across the street from the courthouse for an indefinite period, or that any permission given was a determination that such a demonstration was not "near" the courthouse. Justice Black's dissent contained what was meant to be a warning to future demonstrators that:

> "courts . . . must be kept free from intimidation and coercive pressure of any kind. Government under law, as ordained by our Constitution is too precious, too sacred, to be jeapordized by subjecting the courts to intimidatory practices that have been fatal to individual liberty and minority rights wherever and whenever such practices have been allowed to poison the streams of justice." 85 S. Ct. at 472.

Justice Goldberg's opinion for the Court also contained an admonition:

> ". . . there is no place for violence in a democratic society dedicated to liberty under law, and. . . the right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations." 85 S. Ct. at 486.

(3) Censorship.

In 1961, the Court held that a motion picture censorship ordinance was not an unconstitutional prior restraint simply because it required

that a film be submitted for examination and censorship before showing. Times Film Corporation v. City of Chicago, 365 U. S. 43. The Court in Times Film did not, however, uphold any specific features of the Chicago censorship ordinance there involved. In Freedman v. Maryland, 85 S. Ct. 734 (March 1, 1965), the Court struck down Maryland's motion picture censorship statute on grounds that, while it provided no assurance of prompt judicial determination, exhibition of the film was prohibited pending judicial review which the exhibitor was required to institute. The Court summarized the constitutionally required procedural safeguards in this manner:

> ". . . the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to Court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor . . . . Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." 85 S. Ct. at 739.

These requirements serve effectively to eliminate much of the potential abuse of the traditional licensing system, since the censoring authority would not be permitted to effectively deter showing of motion

pictures by the simple expedient of saying "no". Instead, the state is required, as it is in a criminal prosecution of the exhibitor of obscenity, to shoulder the burden of taking affirmative action to prevent exhibition of the film. It remains to be seen whether the Court's stringent criteria will lead to the abandonment to those few censorship statutes and ordinances which remain effective in the United States.

(4) "Subversive" Activities and Speech.

In 1962, Louisiana enacted an elaborate "Subversive Activities and Communist Control Law" and a "Communist Propaganda Control Law". Members of the National Lawyers Guild and the Southern Conference Educational Fund were prosecuted for failure to register as members of "Communist Front" organizations. The Louisiana law definied "subversive organizations" in language substantially identical to the loyalty oath statute struck down as unconstitutionally vague in Baggett v. Bullitt, 377 U. S. 360 (1964). A three judge district court denied injunctive relief, finding the Louisiana statutes not unconstitutional on their face. Reversing, the Court held that the case was governed by Baggett because, with reference to the constitutional requirement of certainty in statutes touching freedom of expression and association, no distinction could be drawn between vague definitions providing a standard of criminality and those providing the content of a test oath. Dombrowski v. Pfister, 85 S. Ct. 1116 (April 26, 1965).

The substantial constitutional issues presented by the registration requirements for "Communist Front" organizations under the Federal Subversive Activities Control Act were avoided in a pair of Per Curiam opinions. In American Committee for Protection of the Foreign Born v. Subversive Activities Control Board, 85 S. Ct. 1148 (April 26, 1965), and Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Board, 85 S. Ct. 1153 (April 26, 1965), the Court held that the findings of the Board as to the "Communist-Front" status of the petitioner organizations, based on hearings concluded ten or more years ago, were "stale", and could not be the basis for a prospective requirement of registration. Justice Douglas, joined by Justices Black and Harlan, dissented "from the refusal of the Court to face up to the important constitutional questions squarely presented". 85 S. Ct. at 1150.

Substantially overruling American Communications Ass'n v. Douds, 339 U. S. 382 (1950), the Court held Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 unconstitutional as a bill of attainder, United States v. Brown, 85 S. Ct. 1707 (June 7, 1965). The statute makes it a crime for a member of the Communist Party to serve as an officer or employee of a labor union. The Court held that the statute did not set forth a generally applicable rule but had, instead, designated persons who could not hold union office. Cf. United States v.

Lovett, 328 U. S. 393 (1946). As stated by the Chief Justice in his opinion for the Court:

> "It was not uncommon for English acts of attainder to inflict their deprivations upon relatively large groups of people, sometimes by description rather than name . . . . We cannot agree that the fact that §504 inflicts its deprivation upon the membership of the Communist Party rather than upon a list of named individuals takes it out of the category of bills of attainder." 85 S. Ct. at 1721.

Mr. Justice White's dissent, joined by Justices Clark, Harlan and Stewart, concluded:

> "In view of Congress' demonstrated concern in preventing future conduct--political strikes--and the reasonableness of the means adopted to that end, I cannot conclude that §504 had a punitive purpose or that it constitutes a bill of attainder." 85 S. Ct. at 1730.

Lamont v. Postmaster General, 85 S. Ct. 1493 (May 24, 1965), struck down without dissent the 1962 Postal Act requirement that the Postmaster General detain "Communist political propaganda" from foreign countries unless the addressee submits written request for its delivery. Mr. Justice Douglas' opinion, for the Court, held that the inhibition on the addressee, who must affirmatively request delivery, represented an unconstitutional burden on the addressee's First Amendment rights to receive mail. In so doing, the Court has vindicated Mr. Justice Holmes' statement in dissent in Milwaukee Pub. Co. v. Burleson, 255 U. S. 407, 437:

> "The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues . . . ."

Mr. Justice Brennan's concurring opinion, joined by Justices Goldberg and Harlan, pointed out that the sensibilities of unwilling recipients are fully protected by Post Office Regulations under which requests for stoppage of delivery will be honored. On the constitutional issues, with reference to the rights of the sender, raised by the latter practice, see, generally, Schwartz, The Mail Must Not Go Through, 11 U.C.L.A. Law Review 805 (1964).

C. The Franchise.

The most significant reapportionment decision of the year came in Fortson v. Dorsey, 85 S. Ct. 498 (Jan. 18, 1965), where the Court held that provision for multidistrict counties electing state senators by county-wide vote did not, on its face, violate the Constitution. Mr. Justice Douglas, dissenting, argued that it was unconstitutional to allow some candidates to be chosen by the electors in a single district, while others must be elected on a county-wide basis. The Court did indicate that substantial questions under the Equal Protection Clause might be raised by a multi-member constituency apportionment scheme if a demonstration were made that the scheme operated "to minimize or

cancel out the voting strength of racial or political elements of the voting population". 85 S. Ct. at 501. It is likely, however, that such a showing would be extremely difficult to make. See Wright v. Rockefeller, 84 S. Ct. 603 (1964), discussed in our report last year.

Texas law provides that servicemen who move to Texas during the course of military duty cannot vote in Texas elections so long as they remain members of the armed forces. In Carrington v. Rash, 85 S. Ct. 775 (March 1, 1965), the Court held this provision of Texas law in violation of the Equal Protection Clause of the Fourteenth Amendment. Mr. Justice Stewart's opinion for the Court noted that the difficulty of determining the bona fides of residence of transient persons was not limited to military personnel, but that Texas had unlawfully discriminated against servicemen by prohibiting them from voting no matter how long Texas had been their true home. Moreover, in answer to the state's contention that the Texas law was necessary to prevent "take-over" of the civilian community by concentrated voting of personnel at military bases, the Court held that Texas could not constitutionally deny the right to vote to bona fide residents because of a fear of the political views held by that group. Mr. Justice Harlan dissented.

The discriminatory use of literacy tests to deny Negroes the right to vote was before the Court in Louisiana v. United States, 85 S. Ct. 817 (March 8, 1965). In a suit by the United States, a three judge district

court had found that there had been systematic discrimination against Negro voters in Louisiana since 1898. After the Supreme Court invalidated white primary laws in 1944 (Smith v. Allwright, 321 U.S. 649), Louisiana had increasingly relied upon a literacy test which required applicants for registration to "give a reasonable interpretation" of any clause of the Louisiana or United States constitutions. The Court upheld the findings of the district court that the literacy tests vested arbitrary discretion in registrars of voters--a discretion which had been exercised to disenfranchise Negroes in Louisiana. Given the district court's findings, there could be little question of the propriety of the injunction against continued use of the discredited "interpretation test". The district court's injunction had gone further to prohibit the use of a difficult (but "objective") "citizenship" test provided by a 1962 statute. Since voters previously registered were not required to take the test, and since there had been discrimination against potential Negro voters in the past, the Court held that it was appropriate to postpone use of the new test until a complete reregistration of all voters were ordered. Cf. Lane v. Wilson, 307 U.S. 268 (1939).

United States v. Mississippi, 85 S. Ct. 808 (March 8, 1965), involved suit by the United States to enjoin numerous practices discriminating against Negro voters. Despite the apparent clarity of 42 U.S.C. § 1971(c),

the three judge district court, in an opinion, by the late Circuit Judge Cameron, joined by District Judge Cox, had held that the United States lacked authority to bring suit challenging the validity of a state's voting laws. The Court held that it was erroneous to dismiss the complaint without a trial, since the complaint clearly alleged that Mississippi had, for seventy-five years and more, used a combination of discriminatory laws and practices to keep Negro voter registration at a minimum.

In the first case construing the Twenty-Fourth Amendment, the Court struck down Virginia's requirement that voters in Federal elections alternatively pay the poll tax or file a certificate of continuing residence. Harman v. Forssenius, 85 S. Ct. 1177 (April 27, 1965). The Court held that the amendment forecloses all material requirements for voting in Federal elections imposed solely upon those who assert their constitutional exemption from the poll tax. With reference to the question of the continuing vitality of the decision in Breedlove v. Suttles, 302 U. S. 277 (1937), which held the poll tax immune from attacks under the Fourteenth and Fifteenth Amendments, special note should be made of the Court's reliance, in part, on evidence in House and Senate Committee Hearings that the poll tax had been applied in a discriminatory manner to disenfranchise Negroes.

D. The Constitution and Racial Matters.

Since 1954, the Supreme Court has handled gingerly the question whether state laws prohibiting racial intermarriage violate the Equal Protection Clause of the Fourteenth Amendment. In 1955, the Court avoided passing on the issue in an appeal from the Virginia courts, utilizing dubious procedural grounds to avoid decision. Naim v. Naim, 350 U. S. 891 (1955); 350 U. S. 985 (1956). In McLaughlin v. Florida, 85 S. Ct. 283 (Dec. 7, 1964), the Court held unconstitutional a Florida law which made criminal the habitual occupation of a room at night by a Negro and a white person who are not married. The Court did not reach the question whether laws prohibiting racial intermarriage are valid. Mr. Justice White's opinion for the Court, noting that racial classifications bear a heavy burden of justification, held that Florida had not shown sufficient interest in more severe punishment for promiscuity by intraracial couples. Mr. Justice Stewart, joined by Mr. Justice Douglas in his concurring opinion, stated that he rejected any implication in the Court's opinion that "valid legislative purpose" could justify laws, like the one in question, which make the criminality of the act depend upon the race of the actor.

The Court, to the surprise of virtually no one, upheld the constitutionality of the "public accommodations" provisions of the Civil Rights Act of 1964. In Heart of Atlanta Motel v. United States, 85 S. Ct. 348 (Dec. 14, 1964), the Court upheld the application of the

Act to a motel which served interstate travelers. And, in Katzenbach v. McClung, 85 S. Ct. 377 (Dec. 14, 1964), the Court upheld application of the Act to a restaurant which obtained a substantial portion of its food from ultimate out-of-state sources. In both cases, Justice Clark's opinion for the Court rested squarely on past decisions construing the power of Congress under the Commerce clause. Wickard v. Filburn, 317 U. S. 111 (1942). Justices Douglas and Goldberg, in separate concurring opinions, would also have rested Congressional power to pass the Act upon Section 5 of the Fourteenth Amendment.

The Court was, however, narrowly divided on the question whether the public accommodations provisions of the Civil Rights Act of 1964 abated the state criminal trespass convictions of "sit-in" demonstrators on appeal at the time of passage of the Act. Hamm v. City of Rock Hill, 85 S. Ct. 384 (Dec. 14, 1964). Section 203(c) of the Act provides that no person shall "punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by Section 201 or 202". A majority of the Court held that the convictions had been abated by the Act. The Court analogized to the rule of construction applied in a case of Federal crimes - - that convictions on direct review at the time of the repeal of a criminal statute are abated by the statute. We noted in our report last year that there was some question whether the Act would be construed to abate existing

criminal trespass prosecutions which raise serious Fourteenth Amendment issues. It is clear that the Court's construction of the Civil Rights Act was motivated, at least in part, by the desire to avoid those serious and difficult Constitutional issues. Justices Black, Harlan, Stewart and White, dissenting, argued that neither the language nor legislative history of the Act indicated a Congressional desire to upset convictions for past criminal conduct simply because those convictions were on appeal at the time of the passage of the Act. Justices Black and Harlan, further noted that, in their view, there was serious Constitutional question whether Congress had power to abate past state convictions.

E. Miscellaneous Decisions

(1) Freedom of Religion and Conscientious Objectors.

The World War I Draft Act exempted, as conscientious objectors, only those persons affiliated with a "well-recognized religious sect or organization" opposed to participation in war. The 1940 Selective Service Act, opening the exemption to persons not members of organized groups, provided draft exemption for persons opposed to war by reason of "religious training and belief". In 1948, Congress amended the Act to define the latter term to mean "an individual's belief in relation to a Supreme Being involving duties superior

to those arising from any human relation", and excluding "essentially political, sociological or philosophical views or a merely personal moral code". Serious questions have been raised whether the 1948 definition of religious belief, as limited to a belief in a Supreme Being (and the concomitant denial of conscientious objector status to those holding other forms of "religious" belief opposed to war), violated the Free Exercise and Establishment clauses of the First Amendment. In United States v. Seeger, 85 S. Ct. 850 (March 8, 1965), to avoid such serious constitutional issues, the Court interpreted Section 6(j) of the Universal Military Training and Service Act to include all beliefs which "occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption." Mr. Justice Clark's opinion for the Court concluded that this expansive construction of the statute "avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established Congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenents". 85 S. Ct. at 859.

(2) The Right to Travel and State Department Area Restrictions.

Kent v. Dulles, 357 U.S. 116 (1958), held the right to travel abroad to be part of the citizen's liberty protected by the Due Process

clause of the Fifth Amendment. In Kent, the Court held that Congress had not authorized denial of passports to Communists. And, last year, upon the coming into effect of the provisions of the Subversive Activities Control Act, the Court held that the provisions of that Act denying passports to Communists were unconstitutional. Aptheker v. Secretary of State, 378 U. S. 500 (1964). In Zemel v. Rusk, 85 S. Ct. 1271 (May 3, 1965), the Court dealt for the first time with the Secretary of State's power to impose area restrictions on travel. Distinguishing Kent and Aptheker, the Court held that the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211a, authorized the Secretary to refuse to validate passports for travel to Cuba, and that the applicant's liberty had not been inhibited without due process of law. On the constitutional issue, the Chief Justice's opinion, for the Court, held that the Secretary's conclusion that travel to Cuba would involve the United States in dangerous international incidents was justifiable and supported the ban on such travel. Justices Black and Goldberg, in separate dissenting opinions, argued that Congress had not broadly authorized area restrictions by the Secretary. Mr. Justice Douglas, dissenting, urged that the right to travel is a right "peripheral to First Amendment guarantees", and the Secretary's broad powers to set area restrictions rendered the 1926 Act, as construed by the Court, as unconstitutionally broad delegation of power.

(3) Birth Control Devices and Marital Privacy.

The most difficult of decisions in the criminal law are those asserting substantive Constitutional limits to the prosecution of criminal offenses on the basis of implicit, rather than explicit, Constitutional guarantees. See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942), (sterilization of convicted criminals); Lambert v. California, 355 U.S. 225 (1957), (criminal registration ordinance enforced against person without knowledge); Robinson v. California, 370 U. S. 660 (1962), (punishment for narcotics addiction). Griswold v. Connecticut, 85 S. Ct. 1678 (June 7, 1965), involving Connecticut's ban on the use of contraceptive devices, was such a case. Mr. Justice Douglas' opinion for the Court was specific in rejecting the Fourteenth Amendment's Due Process Clause as the foundation for striking down the law, remarking that it was not the Court's function to sit "as a super-legislature to determine the wisdom, need, and propriety" of laws. Rather, the Court relied on a right of privacy protected by the "penumbra" of the Third, Fourth and Fifth Amendments. Justice Harlan, concurring, reiterated the views he had expressed earlier, in Poe v. Ullman, 367 U.S. 497, 522 (1961), that the ban on the use of contraceptive devices by married persons violated a right of privacy implicit in the concept of ordered liberty and thus protected by the Due Process Clause of the Fourteenth

Amendment. Justice White, concurring, also relied upon the Due Process Clause. Justice Goldberg, joined by the Chief Justice and Justice Brennan, concurring, relied upon the Ninth Amendment's reservation of rights "retained by the people" to argue that the enumeration of specific rights in the first eight Amendments did not exclude interpretation of the Constitution to protect fundamental rights unmentioned in the Constitution. That notion was sharply challenged by Justice Black in an opinion in which Justice Stewart joined. Expressing views which he had asserted many times (see e.g., Adamson v. California, 332 U. S. 46, 68 ((1947)) dissenting opinion; compare the dissent of Murphy, J., 332 U. S. at 124), Justice Black strongly decried any constitutional theory which would permit the Court to invalidate legislation because judges found it "irrational, unreasonable or offensive".

Respectfully submitted

Douglas Arant
Herschel H. Friday, Jr.
William P. Gray
Alfred J. Schweppe
Whitney North Seymour Jr.
Lee B. Thompson

Rush H. Limbaugh, Chairman

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

Memorandum

Tolson
Belmont
Mohr
DeLoach
Casper
Callahan
Conrad
Felt
Gale
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

TO : Mr. Felt

DATE: August 5, 1965

FROM : H. L. Edwards

SUBJECT: AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON BILL OF RIGHTS

PROPOSED MANUAL FOR POLICE

The attached clipping from the 8-5-65 issue of "The Evening Star" reports that the captioned American Bar Association committee will be considering a preliminary draft of a manual for police guidance at the forthcoming annual meeting of the Association in Miami next week. The news item characterizes this as a "how-to-do-it guide" for police officers to insure "compliance with the Constitution's mandates" and thereby avoid public criticism and possible nullification of law enforcement activities by the courts. It indicates this proposed handbook was prepared after a survey of state police officers in the 50 states produced "eye opening" information about the coverage of operating manuals and this booklet is intended to provide a "practical set of suggestions on how to see that the Bill of Rights is put into practice in day-to-day police work."

The Bureau is, of course, aware of the work of this committee. This project is one which they have been wrestling with for about two years. It started out as a project to draft recommended standards applicable to (1) investigative agencies, (2) prosecuting attorneys, (3) defense lawyers, and (4) the news media. In view of the Judge Lumbard Committee Study on Minimum Standards for the Administration of Criminal Justice, the Committee has had to narrow its Study.

REC 45 94-1-369—1998

EX-103

The news item indicates that this manual will not be ready for publication until 1966 because it will have to be reviewed by other interested American Bar Association committees for possible revision. Of necessity, it will have to be considered by the Criminal Law Section and by the Lumbard committee.

2 SEP 27 1965

I will obtain copies of the preliminary draft at the meeting in Miami and submit them to the Bureau for review. I will also follow the progress of this proposed handbook closely so that our interests will be protected.

ACTION: Information.

SENT DIRECTOR
8-5-65

1 - Mr. DeLoach
1 - Mr. Casper
HLE:mbk (7)

67 OCT 4 1965

ENCLOSURE

U.S. Bar Handbook Lists Suspects' Rights

By DANA BULLEN
Star Staff Writer

MIAMI—A novel handbook to help police avoid violating the constitutional rights of criminal suspects has been prepared by a committee of the American Bar Association.

It is billed by the ABA's Bill of Rights Committee as a "how-to-do-it guide" for officers in communities across the nation. The manual, at present, is in preliminary draft form.

The handbook proposal is one of a number of matters scheduled to come up at the ABA annual convention getting under way here. Some of its contents could become controversial.

Starting with the quotation from Gilbert & Sullivan that "a policeman's lot is not a happy one," the suggested handbook goes on to outline recent Supreme Court rulings and recommend practices.

"Compliance with the Constitution's mandates by police officers is a protection against public criticism and against possible nullification of law enforcement activities by the courts," the booklet states.

Advice to Police

Getting down to cases, it then tells officers that:

1. Reasonably orderly pickets and demonstrators "are entitled to express their views . . . without police interference." Officers are urged to be patient with any "jibes and jeering."

2. Questioning of suspects for unreasonable periods of time, promises of favored treatment or refusal to permit a suspect to consult family or friends are "likely to create problems."

3. Release to the press of a defendant's criminal record, the fact that he has made confession, expressions of opinion as to guilt and the nature and extent of evidence "should be avoided."

4. Suspects should be advised that they have a right to be represented by counsel, and interrogation should be suspended until a suspect who indicates a desire for a lawyer can consult one.

Among other points, the guide states that laws are to be enforced "fairly and evenly, not on the basis of any political motivation, personalities or animosity toward any particular race or group."

An appendix to the suggested handbook indicates that the best moves for a suspect are: Get a lawyer, say nothing that can be held against him, notify family or friends and apply for bail.

Suspects also are urged in this section, taken from a leaflet distributed to the public in Texas, not to resist a policeman, talk back or be disorderly or refuse entry for a lawful arrest.

Cites Demonstration's Value

The section of the proposed handbook on 1st Amendment rights of speech and assembly touching on demonstrations says that officers will "strengthen our country" by using courtesy, tact and patience."

"They will thereby be obeying the law themselves, while permitting others to exercise probably the most basic right of our democracy," the proposed booklet states.

" . . . A democracy survives best when unpopular ideas can be freely expressed in public, rather than confining them to secret, underground conspiracies . . . ," the booklet states.

The proposed handbook was prepared by the ABA committee after a survey of state police officers in the 50 states produced "eye opening" information about the coverage of operating manuals.

The booklet, its preface states, is intended to provide a "practical set of suggestions on how to see that the Bill of Rights is put into practice in day-to-day police work."

The ABA committee, however, plans to postpone actual publication until after the beginning of the year to permit other ABA units "to indicate any revisions they think may be desirable."

memo for Mr Felt 8/5/65 HLE/mkb

ENCLOSURE 94-1-369-1998

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

Memorandum

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Tele. Room
Holmes
Gandy

TO : Mr. Felt

DATE: September 30, 1965

FROM : H. L. Edwards

SUBJECT: AMERICAN BAR ASSOCIATION
FEDERAL LEGISLATION AND NATIONAL ISSUES

I have received the attached communication from the American Bar Association requesting any helpful views in connection with their current efforts to up-date their reference "Blue Book" containing policy resolutions on Federal legislation and national issues which the American Bar Association has previously officially taken.

They enclosed several specific items, all of which deal with matters handled by or of interest to the Domestic Intelligence Division, the Special Investigative Division, or the Legal Research Desk of the Training Division. A copy of their cover instruction page, together with copies of the matters pertinent to each of the three divisions mentioned, is being designated for those divisions with the recommendation being made that same be reviewed and pertinent information furnished to me for acknowledgment of this request for cooperation. I will be able to handle any action in accordance with the Bureau's best interests.

RECOMMENDATION:

That the Divisions for whom a copy of this material is designated analyze along the lines of the attached instructions and return to me for appropriate action.

Enclosures

1 - Mr. Casper
1 - Mr. Sullivan
1 - Mr. Gale

HLE:mbk
(5)

ENCLOSURE

EX 110

REC-49 94-1-369-1999

10 OCT 8 1965

69 FEB 9 1966

STANDING COMMITTEE ON EDUCATION AGAINST COMMUNISM

(Note--This Committee established at 1962 annual meeting to succeed Special Committee to Study Communist Tactics, Strategy and Objectives)

94-1-364-1999

SPECIAL COMMITTEE ON INDIVIDUAL RIGHTS AS
AFFECTED BY NATIONAL SECURITY

ENCLOSURE

94-1-361-1999

WASHINGTON OFFICE
Director
Donald E. Channell
Assistant Director
Lowell R. Beck
Assistant to the Director
H. Michael Spence

AMERICAN BAR ASSOCIATION

1705 De Sales Street, Washington, D.C. 20036 Tel. (202) 659-1330

To: Committee and Section Chairmen

From: [redacted] Washington Office

b6
b7C

Subject: "Blue Book" entitled Policy Resolutions on Federal Legislation and National Issues

The enclosed resolutions are for your information and use during the forthcoming year. These resolutions represent all policy statements affecting national issues which originated in your Section or Committee or in a related Section or Committee. A copy of these resolutions will be sent to your Chairman each year.

During the past few years many outdated resolutions have been removed from the "Blue Book". We believe that the existing resolutions are predominantly current. However, in order to maintain the book accurately, we request that your Section or Committee review all the enclosed resolutions during the year to determine if they are current. If any deletions are recommended by appropriate Section or Committee action, those recommendations should be sent to the Washington Office in time to be included in a general report on the Blue Book submitted to the Board of Governors at the Annual meeting in August, 1966.

We suggest that any resolution which falls into one or more of the following categories be modified or revoked.

a. The resolution duplicates other resolutions.

b. The purpose expressed in the resolution has been accomplished, i. e. legislation enacted.

c. Specific congressional bills which are supported or opposed are not current.

d. The substance of the resolution no longer represents the views of the Association.

e. The resolution conflicts with other policy positions of the Association.

Only through your continuing review, assistance and comments can we maintain our policy on a current basis. Your Section or Committee views on these resolutions will be appreciated.

ENCLOSURE

94-1-369-1999

1954

CODE OF INVESTIGATIVE PROCEDURE

RESOLVED, That the American Bar Association recommends to the Congress the adoption of a code of investigative procedure which embodies the following principles: (These principles are outlined from pages 125 - 129 of the 1954 Annual Report. Amendments to the original resolution as adopted by the House are found on pages 130 - 132.)

NOTE--These principles for a proposed code of investigative procedure are not specific rules of procedure but certain basic principles to be embodied in such rules, to be applied to congressional investigating committees.

ENCLOSURE

1500.

1957

COMPELLING ATTENDANCE AND TESTIMONY OF WITNESSES AT CONGRESSIONAL HEARINGS

RESOLVED, That the House of Delegates of the ABA endorses the principle of proposed legislation, whereby the Houses of Congress and their Committees would be authorized to invoke the aid of the United States District Courts in compelling attendance and testimony of witnesses, and urges its prompt enactment by Congress.

FURTHER RESOLVED, That the Committee on Individual Rights as Affected by National Security be authorized to appear before committees of the Congress in support of the enactment of said legislation.

EXPLANATION: Under the present statutes, contempt of a committee of Congress is punishable upon indictment and trial. The trial of person alleged to be in contempt of a committee of Congress frequently occurs months, or perhaps years after the conclusion of the investigation in which the alleged contempt occurs. The matter of relevancy of a question to the subject of the committee investigation, or the authority of the committee to inquire into a particular subject, is often the basis of refusal of a witness to answer. A prompt determination of those questions is desirable, both from the point of view of the committee and the witness.

It is the view of the committee that if the procedure envisoned by H.R. 259 could be envoked immediately and a prompt judicial determination could be obtained thereby, the work of the investigating committee would be implemented and expedited, information frequently would be obtained from witnesses which is not available under existing procedures. The interest of the National Security thus would be served.

This committee is charged with making recommendations which will bring about the best possible balance between the demands of National Security and the production of Individuals Rights. It is the opinion of the committee that the proposed legislation, while implementing legitimate investigations by Congress, would also tend to protect individual rights in that a committee faced by a recalcitrant witness would be unlikely to abuse the witness, or to resort to unfair or improper procedures, if the committee recognized the possibility that its procedure might be subject to judicial scrutiny at any time by a United States District Court, in connection with contempt proceedings against the witness. It is believed that the enactment of the legislation is, therefore, in the interest of both National Security and Individual Rights.

1958

JENNER BILL

The following was adopted by the Board:

RESOLVED, That the Association opposes the enactment of the so-called Jenner Bill, S. 2646, as amended and reported by the Judiciary Committee of the Senate which combines a limitation on the appellate jurisdiction of the Supreme Court and a threat to the independence of the Judiciary with substantive changes with far reaching significance which should be considered independently of each other and only after adequate public hearings at which the organized bar and others interested can be heard. This action does not constitute approval or disapproval of the substantive changes proposed by Sections 3 and 4.

BE IT FURTHER RESOLVED, That in expressing its opposition to the enactment of S. 2646, as amended, the American Bar Association reaffirms its position as expressed in the resolution on this subject adopted by the House of Delegates of the Association at Atlanta, Georgia on February 25, 1958.

JENNER BILL OPPOSED

WHEREAS, in 1949, the ABA adopted a resolution urging the Congress to submit to the Electorate an amendment to the Constitution of the U. S., to provide that the Supreme Court of the U. S. shall have appellate jurisdiction in all matters arising under the Constitution; and

WHEREAS, S. 2646, now pending before the Congress, if enacted, would forbid the Supreme Court from assuming jurisdiction in certain matters, contrary to the action heretofore taken by this Association and contrary to the maintenance of the balance of power set up in the Constitution between the Executive, Legislative, and Judicial branches of our Government; and

WHEREAS, Although since 1949, there have been rendered by the Supreme Court decisions within the fields specified in S. 2646 which are felt by many to be contrary to recognized Constitutional precedents and which undertake to confer upon the Federal Government powers reserved to the states by the Constitution of the U. S. and to confer upon the Supreme Court authority not vested in it by that document; nevertheless, the welfare of the people of the U. S. may be better served by preserving the checks and balances of our Constitutional form of Government than by in effect removing from the Legislative branch restraints of Constitutional limitations within the vital fields of the human conduct.

BE IT RESOLVED, by the American Bar Association that it opposes the passage of S. 2646.

NOTE--At the recommendation of the Board of Governors, the House went on Record as opposing S. 2646 by Senator Jenner (R. Ind.) which would remove from the jurisdiction of the United States Supreme Court five categories of cases now reviewable by that court. The bill would leave to lower courts decisions in cases involving Congressional Committees, Federal Employees Security Programs, State and Local Subversional Laws, School Boards, and Admissions to the Bar. The House-approved resolutions said the bill was "contrary to the maintenance of the balance of powers set up in the Constitution."

1960

JOINT REPORT OF THE SPECIAL COMMITTEE ON INDIVIDUAL RIGHTS AS AFFECTED BY NATIONAL SECURITY AND THE SPECIAL COMMITTEE ON COMMUNIST TACTICS, STRATEGY, AND OBJECTIVES

The following recommendation was approved by the Board of Governors on October 30, 1959:

Division I: Recommendations as to Passport Procedures

RESOLVED, That the Association recommends to the Congress the enactment of legislation containing the following principles with respect to the control of travel abroad by U. S. citizens:

(a) The Secretary of State shall be authorized to refuse to issue a passport to any person as to whom it is determined on substantial grounds by a preponderance of the evidence that he knowingly engages in activities calculated to further the international Communist movement and having a tendency to endanger the national security or tending to seriously impair the conduct of the foreign relations of the U. S.

(b) If a passport is denied, revoked, or restricted for any reason stated in paragraph

(a) Hereof, the applicant or holder shall be informed in writing of the reason, as specifically as is consistent with considerations of national security and the conduct of foreign relations, and shall have and be informed in writing of the right to a hearing before the Passport Hearing Board.

(c) The Secretary shall be required to establish within the Department of State a Passport Board, at least one member of which shall be a lawyer, to review the denial, revocation or restriction of a passport. The members of said Board shall be independent of and have no responsibility related to the issuance, denial, revocation, or restriction of passports other than their duties as members of said Board.

Continued Next Page

(d) In proceedings before the Passport Hearing Board, the Secretary shall be required to establish and enunciate publicly the procedural safeguards available whereby the rights accorded to an individual are protected. In such proceedings, the individual shall have the following rights which shall be included in the rules which the Secretary shall make public:

(1) To appear in person and to be represented by counsel.

(2) To testify in his own behalf, present witnesses and offer such evidence.

(3) To cross-examine witnesses appearing against him at any hearing at which he or his counsel is present and to examine all other evidence which is made a part of the open record.

(4) To examine a copy of the transcript of the open record and upon request to be furnished a copy thereof.

(e) The right to confront and cross-examine all witnesses and to examine all documentary evidence considered by the Board shall be accorded, except where the Secretary of State or Acting Secretary of State, personally, shall certify that information or the sources of information or the investigative methods pertaining to the individual is believed by him to be reliable and cannot be disclosed without serious damage to national security or the conduct of foreign relations. The Secretary or Acting Secretary shall furnish to the individual during the course of the proceedings a fair written resume of such information certified by him to be as complete and consistent with national security or the conduct of foreign relations.

(f) The Board shall take into consideration the individual's inability to challenge information of which he has not been advised in full or in detail or the individual's inability to attack the credibility of sources that have not been disclosed to him.

(g) Review procedure in the U. S. District Courts for the District of Columbia shall be provided. In such review, the court shall determine whether the decision of the Secretary is based on substantial evidence in the record and that procedural requirements have been met.

RESOLVED, That the American Bar Association authorize the Chairman of the said Special Committees jointly to appear before the committees of the Congress to state the position of the Association in conformity with the foregoing resolution.

Continued Next Page

Division II: Recommendations as to Federal Employee Security

WHEREAS, The Association believes that employment by the Federal Government is a privilege and not a right; and

WHEREAS, The Association believes that the American public is entitled to the service of loyal and suitable employees without regard to whether employed in sensitive or non-sensitive government positions; and

WHEREAS, The Association believes that all employees of the government are entitled to due process of law in the consideration of loyalty and suitability;

NOW, THEREFORE, BE IT RESOLVED, That the Association recommends to the Congress the enactment of comprehensive legislation covering Federal Civilian Employee Loyalty and Security Discharge Procedures and procedures to apply to application cases under which employment is refused on loyalty or security grounds. Such legislation shall establish specific standards and criteria defining sensitive and non-sensitive government positions and prescribe adequate administrative procedural safeguards for the hearing and review of such cases, including a broad, but not unlimited right, of confrontation.

RESOLVED, That the Association authorize the Chairman of the said Special Committees jointly to appear before the committees of the Congress to state the position of the Association in conformity with the foregoing resolution.

Comment--The committees have noted the various bills for passport legislation pending in the Congress. None of such bills conforms fully to the foregoing resolution on passport legislation.

It is the consensus of the committees that the Wiley Bill, S. 2315, most nearly meets the provisions of the resolution on passport legislation and your committees recommend that said bill be amended to conform thereto.

1952

COMMENDATION OF HOUSE UN-AMERICAN ACTIVITIES COMMITTEE

WHEREAS, The Special Committee to Study Communist Tactics, Strategy and Objectives has, since its appointment, observed and studied the work of the House Un-American Activities Committee as evidenced by the official transcripts of testimony adduced at public hearings, based upon which it is our view that the constitutional rights of witnesses have been protected by the congressional committee; and,

WHEREAS, This Association's committee believes that it is in the interest of the people of the United States that any person heretofore a member of the Communist Party, who has withdrawn therefrom and completely renounced the principles of Marxism-Leninism, come forward and testify before any accredited government agency as to the facts within his knowledge and experience of the activities of the Communist Party, its members and followers:

BE IT RESOLVED, That the American Bar Association express its approval of the manner in which the investigation and hearings by the present Committee on Un-American Activities of the House of Representatives and the Subcommittee of the Senate Judiciary Committee on the Internal Security Act are now being conducted and we commend said committees for their continuing inquiry into the activities of the Communist Party, its members and followers, in order to establish a basis for appropriate legislation; and

BE IT FURTHER RESOLVED, That the American Bar Association lend its moral support and encouragement to any person now or heretofore a member of the Communist Party or who in any wise embraced the doctrines of Marxism-Leninism and who is now desirous of coming forth and testifying under oath in order to expose its conspiratorial aims and purposes.

1959

OPPOSITION TO OMNIBUS PROPOSALS TO LIMIT JURISDICTION OF SUPREME COURT

WHEREAS, The Supreme Court of the United States and an independent judiciary created by the Constitution, have been are are the ultimate guardians of the Bill of Rights and the protectors of our freedom, and as such it is the duty of members of the Bar to defend the institution of the judiciary from unfair and unjust attacks; and

WHEREAS, This Association recognizes that sharp differences have been expressed as to the soundness of some of the recent decisions of the United States Supreme Court affecting the National and State security, with particular reference to the activities of domestic and foreign Communists within our country; and

WHEREAS, Such differences have given rise not only to severe criticisms of the decisions, but unfortunately to condemnation of the Court itself, and to omnibus proposals for limiting its appellate jurisdiction; and

WHEREAS, While members of this Association view some of the decisions to be unsound and incorrect, they deem such broad omnibus proposals at this time as unwise and likely to create more problems than they will solve;

THEREFORE BE IT RESOLVED, That the American Bar Association disapprove proposals to limit any jurisdiction vested in the United States Supreme Court.

BE IT FURTHER RESOLVED, That wherever there are reasonable grounds to believe that as a result of court decisions weaknesses in internal security have been disclosed, remedial legislation be enacted by the Congress of the United States, including a specific pronouncement of Congressional intention that state statutes prescribing sedition against the United States shall have concurrent enforceability.

PROPOSALS FOR STRENGTHENING THE INTERNAL SECURITY ACT

WHEREAS, Recent decisions of the United States Supreme Court in cases involving National and State security and with particular reference to Communist activities, have been severely criticized and deemed unsound by many responsible authorities; and

WHEREAS, Problems of safeguarding National and State security have been exposed or created thereby which this Association feels would be best solved by the careful study of each decision and the prompt enactment of sound amendments to existing laws within the Constitutional powers of Congress.

NOW, THEREFORE, BE IT RESOLVED, That this Association recommend to the Congress the prompt and careful consideration and study of recent decisions of the United States Supreme Court and the preparation and passage of separate amendments to the laws involved so as to remove any doubt of the intent of the Congress, and to remedy any defect in the existing law revealed by the decisions.

BE IT FURTHER RESOLVED, That legislation be promptly enacted to eliminate obstacles to the preservation of our internal security in the following areas:

AMEND the Smith Act to make it a crime intentionally to advocate the overthrow of the Government of the United States or to teach the necessity, desirability, or duty of seeking to bring about such overthrow, in order that: (1) this Nation might take protective steps to prevent acts which if not prevented, could result in bloodshed and treachery; and (2) this Nation need not be forced to delay the invoking of the judicial process until such time as the resulting damage already had been wrought.

ESTABLISH the right of each branch of the Government to require as a condition of employment that each employee thereof shall not refuse to answer a query before a duly authorized Committee of the Congress or before duly authorized officers of either the Executive or Judicial branches of the Government with respect to Communism, Communist front or other subversive activities or any matter bearing upon his loyalty to the United States, as the Government has a right to know his record.

Continued Next Page

INVEST the Executive branch of the Government with the right to make and enforce reasonable restrictions on aliens awaiting deportation to prohibit them from engaging in any activities identical or similar to those upon which the aliens' deportation orders were based, with the further right to interrogate aliens awaiting deportation concerning their subversive associates or activities.

INSURE the effectiveness of the Foreign Agents Registration Act of 1948 by the requirement that the political propaganda by agents of foreign principals be labeled for what it is where such agents are situated outside the limits of the United States, but nevertheless directly or indirectly disseminate such propaganda within the United States.

RECOMMENDING CONTINUED INVESTIGATION OF COMMUNIST ACTIVITIES

WHEREAS, The Respective records of the Subcommittee on Internal Security of the Senate Judiciary Committee and the House Un-American Activities Committee both charged with the duty of investigating internal security and Communist activities are records of accomplishment and great service to the Nation; and

WHEREAS, The continuation of the work of these Committees is essential to the enactment of sound and adequate legislation to safeguard the National and State security;

NOW, THEREFORE, BE IT RESOLVED, That the American Bar Association recommends that the House of Representatives continue to maintain a committee to investigate matters relating to National Security with particular emphasis on Communist activities invested with adequate jurisdiction to accomplish its purpose, and that the Senate continue to maintain and support its Subcommittee on Internal Security; and

BE IT FURTHER RESOLVED, That such Committees maintain close liaison with the Intelligence and Security Agencies as well as with the Attorney General of the United States, to the end that they may be kept advised as to the legislative needs of the Executive branch of the Government required to carry out its responsibilities for internal security.

1963

DISTRICT COURT RULES OF CRIMINAL PROCEDURE - RULE 11

.....recommendation was adopted as follows:

That the Preliminary Draft of Proposed Amendment to Rule 11 of Rules of Criminal Procedure for the United States District Courts be disapproved but in lieu thereof the following amended Rule or one of similar import be drafted:

Rule 11. Pleas

A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty and shall not accept the plea without first (a) making such inquiries as may satisfy it that the defendant in fact committed the crime charged and (b) addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

Memorandum

Tolson
Belmont
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Trotter
Tele. Room
Holmes
Gandy

TO : Mr. Felt

DATE: November 3, 1965

FROM : H. L. Edwards

SUBJECT: AMERICAN BAR ASSOCIATION'S MIDYEAR MEETING
CHICAGO, ILLINOIS; FEBRUARY 16 - 22, 1966

I have received a request for confirmation of my attendance at business meetings of the American Bar Association's Standing Committee on Education Against Communism, of which I am a member, scheduled for Saturday and Sunday, February 19 - 20, 1966. This will be held in conjunction with the Midyear Meeting of the American Bar Association scheduled for February 16 - 22, 1966, in Chicago, and, since this is the important business meeting of the Association which the Bureau's representative always covers in its entirety, this memorandum is submitted to also obtain authorization for coverage of that meeting. There will be business meetings of the Criminal Law Section, of which I am an officer, and also the House of Delegates, the Board of Governors, and other activities of direct interest to the Bureau.

It is essential to obtain clearance for attendance sufficiently in advance to assure hotel accommodations and also to confirm attendance to the various committee and section chairmen.

RECOMMENDATION:

That I be authorized to confirm my attendance at the Midyear Meeting of the American Bar Association, February 16 - 22, 1966. On approval, this memorandum should be returned to the Inspection Division for further action.

1 - Mr. DeLoach

HLE:mbk
(4)

confirmation made by Lt 11/18/65 HLE

REC- 41 94-1-369-2000

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53 NOV 15 1965

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27
5010-106

UNITED STATES GOVERNMENT

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TO : Mr. Mohr

DATE: 9/27/65

FROM : J. J. Casper

SUBJECT: AMERICAN BAR ASSOCIATION
88TH ANNUAL MEETING, MIAMI BEACH, FLORIDA

STANDING COMMITTEE ON THE BILL OF RIGHTS
PROPOSED HANDBOOK FOR LAW ENFORCEMENT OFFICERS

H. L. Edwards to Mr. Felt memorandum, dated 8/17/65, requested Training Division examine the text of a proposed handbook to be issued by the American Bar Association for the use of local law enforcement officers. The handbook contains comments on how to avoid violations of the provisions of the Bill of Rights of the United States Constitution. The Legal Research Desk has examined the text of the booklet, designed to be printed in 16-page pocket-size form.

It is recognized that any booklet in such brief form, covering such a large area of the law must necessarily be couched in broad terms. Nevertheless, to correct false impressions, the following criticisms and suggested changes are offered:

(1) While brevity is of the order, it might be of value to spell out the entire content of the Bill of Rights. As the first ten amendments are brief, little more space would be required. Excerpts from the Fourteenth Amendment should suffice.

(2) The word FOREWORD is misspelled.

(3) (Foreword) The last sentence of the foreword appears to be incomplete and illogical. The Bill of Rights does not appear to the normal officer to be based on common sense, much of it goes in the face of what the officer believes to be common sense in many situations. The Bill of Rights is rather based on the

1 - Mr. DeLoach
1 - Mr. Felt
1 - Mr. H. L. Edwards
JAM:pal
(5)

ENCLOSURE

Ltr to Rush H. Limbaugh (Comm. on Bill of Rights) 11/24/65

REC-61 94-1-24-1-2001

"CONTINUED"

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practical fears of a tyranical federal government as experienced by the early American Colonists under the English Crown. The limitations on police work imposed by the guarantee of those rights are not designed to make the officers' jobs simpler. However, following recent decisions of the United States Supreme Court, the local officers must completely understand what is included within those limitations in order to satisfactorily perform their jobs.

(4) (Fourth Amendment) The recommended practice under "Searches and Seizures" should be rewritten at page 8. Line 6 could be amended to read: ". . . incidental to a valid arrest, or with a proper consent (which should be obtained in writing, if possible)." It should be noted that as written, "with the consent of the owner," is an inaccurate statement as regards many premise searches. It is the person who has the "right of occupancy" quite often not the owner, who has the benefit of the Fourth Amendment protection in premises.

The last two sentences under section "Search and Seizure" are too restrictive. Also, the right to search the person incidental to an arrest, probably the most important search for the safety of the officer and most justified in the law, should be singled out. Therefore the following substitution is offered: "Officers should be careful to limit their searches made at the time of arrest to the person of the defendant or to the area under his immediate control. Searches under search warrant should comply precisely to the terms of the warrant. Of course officers are not required to ignore patent evidence of other crimes located during a valid search incident to arrest or with a search warrant. They should however, carefully limit the search to that authorized area as other practices run the danger of violating the Bill of Rights and thus would render the results of an extended search inadmissible in evidence."

(5) (Fifth Amendment) Following the Jackson v. Denno citation on page 9, it would appear pertinent to re-emphasize two points: One, the principle involved is the privilege against self incrimination which excludes the involuntary confession. Two, the truth of the confession is immaterial when obtained in

violation of the constitutional provisions. The latter point, which appears the main point in the cited Rogers v. Richmond case is one most difficult for local police officers to understand.

In Rogers v. Richmond the confession was taken through activity of an assistant chief of police, not the chief as set out in the proposed text.

The citation to Mallory v. United States seems out of place. Mallory is a per se rule based on the violation by officers operating under Rule 5a of the Federal Rules of Criminal Procedure and did not turn on the voluntariness of the confession. Thus it does not stand for the proposition that use of a lie detector, or 10-hour questioning period rendered the statement involuntary. The citing of Mallory here, in this manner, might clearly mislead some officers and the reference should be deleted.

Under the "Recommended Practice" portion, two suggestions should be made. First, emphasis should be given to the main point in the test of voluntariness, viz., voluntariness turns on the overwhelming of a particular person's mind to resist a confession, based on his age, physical and mental health, education, emotion, criminal experience, nationality, and such other factors as his basic needs, sleep, food, and clothing, etc. Second, the reference to McNabb v. United States will confuse the local officer again. McNabb stands for the same principle as Mallory, the violation by officers acting under the Federal Rules of Criminal Procedure and in violation of Rule 5a thereof. While several states do have similar code requirements, they have no exclusionary rule applied to them generally as has been applied to officers acting under the federal rules by the United States Supreme Court in McNabb and Mallory.

It further appears that the American Bar Association should not compound the error of the misuse of the term "arraigned" as done here. The requirement under Rule 5a involves that time between arrest and first appearance

before a United States Commissioner, or other judicial officer. The "Arraignment" of course, comes later, after the person has been indicted or waives indictment and an information is filed, under the Federal Procedure. The misuse of the term "arraignment", even by high judicial officers, in recent years has caused confusion to both police officers and attorneys.

(6) (Sixth Amendment) The Massiah citation may confuse officers as regards interviews of persons represented by counsel. The privilege remains that of the client, not the attorney, and the cited Escobedo case clearly sets out in footnote 14 that "the accused may, of course, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pretrial stage or at the trial."

Under "Recommended Procedure" as outlined, the officer may be confused as to when the warnings are to be given. As written it seems to imply that the warnings need be given only when the officer is getting ready to take a written statement. The section should clearly indicate that the necessary warnings must be given prior to the questioning of any suspect to elicit an admission or confession of his own guilt from him once the accusatory phase of the investigation is entered.

As the portion offered seemingly quotes from the caution used by the FBI and as in practice the caution statement used by the FBI is actually in considerable more detail, and is changed according to the circumstances under which it is taken, the quotation marks should be removed. The implication is that the offered portion is a standard one used by the FBI.

The portion regarding the Gideon citation may also well confuse the officer in the offered sentence, "If he says that he wants a lawyer but cannot afford one, steps should be taken to see that counsel is provided." The clear implication here is that the officer must determine if the accused can afford a

lawyer and then takes steps to provide one. The section should indicate that neither the determination nor the providing of the lawyer is the responsibility of the officer. The section should state that should the person indicate the desire for an attorney, the desire should be immediately referred to the prosecuting attorney, or other appropriate state official, for consideration of appointment of counsel.

(7) (Appendix) Under section titled, "How is an Arrest Under a Warrant Made," an editorial comment should be affixed pointing out that officers in most jurisdictions, including federal officers, are not required to have a copy of the arrest warrant in their possession when making an arrest under such warrant.

RECOMMENDATION:

That the criticisms, proposed deletions and amendments be furnished through proper channels to the American Bar Association by Inspector H. L. Edwards.

OPTIONAL FORM NO. 10
MAY 1962 EDITION
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5010-106

UNITED STATES GOVERNMENT

Memorandum

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TO : Mr. Felt

DATE: November 1, 1965

FROM : H. L. Edwards

SUBJECT: MISSISSIPPI RESOLUTION CALLING FOR CONSTITUTIONAL AMENDMENT TO OUTLAW COMMUNIST PARTY, USA AND RELATED ACTIVITIES

JOHN C. SATTERFIELD, PAST PRESIDENT
AMERICAN BAR ASSOCIATION

John C. Satterfield, Past President of the American Bar Association, currently practicing law in his home state of Mississippi, has requested the American Bar Association's Standing Committee on Education Against Communism to give him the Committee's reaction to a resolution adopted by the Mississippi Legislature 6/23-24/65. Morris I. Leibman, Committee Chairman, has sent a copy of the resolution to Committee members asking for any reaction they may care to give.

The resolution is attached. It has a number of "Whereas" clauses, all of them seeking to lay the foundation that the Communist Party, USA, is an arm of the world communist conspiracy, that it is a clear and present danger to the security of the United States, that, although Congress has sought to control or counteract this threat, the U. S. Supreme Court has rendered such action virtually impossible, and, therefore, the Mississippi Legislature petitions Congress to call a Constitutional Convention to propose an amendment to the Constitution which will empower Congress to prevent dissemination of propaganda detrimental to the National security or contrary to the National interests, similarly expel from the United States any agent or representative of such foreign governments who is an alien and who engages in propaganda dissemination.

Copies of this resolution were to have been sent to the President of the U. S. Senate, Speaker of the U. S. House of Representatives, to the Secretary of the U. S. Senate, the Clerk of the U. S. House of Representatives, and to each member of the U. S. Congress from the State of Mississippi.

EX 110 REC. 41 94-1-362-2002

This resolution, of course, is not desirable. However, in view of Satterfield's seeing fit to request some expression of reaction from the Standing Committee on Education Against Communism, it will undoubtedly come up on the next Committee meeting agenda which will be prior to the American Bar Association's Midyear meeting in early February, 1966.

8 NOV 10 1965

Enclosure

1 - Mr. Sullivan 1 - Mr. DeLoach

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(CONTINUED - OVER)

Memo Baumgardner to Sullivan 11-18-65
EBR/pm

69 FEB 2 1966 ENCLOSURE

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UNRECORDED 94-1-362-2002 IN 100-3

Memorandum to Mr. Felt
Re: Mississippi Resolution Calling for Constitutional Amendment to Outlaw Communist Party, USA, and Related Activities; John C. Satterfield, Past President, American Bar Association

RECOMMENDATION:

That the Domestic Intelligence Division conduct appropriate research and prepare a background memorandum together with any suitable guidance for my use in discussing this matter in the Committee's meeting.

STATE OF MISSISSIPPI

HOUSE CONCURRENT RESOLUTION NO. 14

A CONCURRENT RESOLUTION PETITIONING THE CONGRESS OF THE UNITED STATES TO CALL A CONVENTION FOR THE PURPOSE OF PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

WHEREAS, all three branches of the Government of the United States have recognized the existence of the world Communist conspiracy and the fact that the Communist Party, USA, operates as an arm of such conspiracy in seeking to bring about the overthrow of the Government of the United States by force and violence; and

WHEREAS, the operations and activities of the world Communist conspiracy and the Communist Party, USA, have been found to constitute a clear and present danger to the security of the United States; and

WHEREAS, any totalitarian organization controlled or dominated by the world Communist conspiracy or by the foreign nation controlling such conspiracy, or by any agent or agency of such conspiracy or such foreign nation, and having as its purpose or one of its purposes the overthrow of the Government of the United States by force and violence, might well constitute a clear and present danger to the security of the United States; and

WHEREAS, the Congress of the United States by various enactments from time to time has sought to control or counteract the threat of the Communist Party, USA, and its operations and activities, and other similar subversive organizations, operations and activities; and

WHEREAS, the Supreme Court of the United States through various decisions has circumscribed, limited, or invalidated such congressional enactments, on constitutional grounds, with the result that action by the Congress of the United States to counteract or control effectively such clear and present dangers to the security of the United States has been rendered virtually impossible: NOW, THEREFORE,

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF MISSISSIPPI, THE SENATE CONCURRING THEREIN, That this Legislature respectfully petitions the Congress of the United States to call a convention for the purpose of proposing the following article as an amendment to the Constitution of the United States:

"ARTICLE _____

"SECTION 1. Notwithstanding any other provision of the Constitution, the Congress shall have power to declare illegal, or order the dissolution of, or provide for control of, any activity or activities of the Communist Party, USA, or any successor thereto, or any other organization, which the Congress finds (1) is totalitarian in nature, (2) is substantially controlled by the world Communist conspiracy or by the foreign nation controlling such conspiracy or

by any agent or agency of such conspiracy or such foreign nation, and (3) has as its purpose or one of its purposes the overthrow of the Government of the United States by force and violence, whenever the Congress shall find that such organization or its activity or activities constitutes a clear and present danger to the security of the United States.

"SEC. 2. Notwithstanding any other provision of the Constitution, the Congress may prevent the dissemination within the United States, by or on behalf of any Communist foreign government or any foreign government with which the United States does not have diplomatic relations, of such propaganda as the Congress may determine to be detrimental to the national security or contrary to the national interest.

"SEC. 3. The Congress may provide for the summary expulsion from the United States, without judicial proceedings, of any agent or representative of any such foreign government who is not a citizen of the United States and who is engaged in the dissemination of any such propaganda.

"SEC. 4. The Congress shall have power to enforce, by such legislation as it shall deem appropriate, the provisions of this article."

BE IT FURTHER RESOLVED, That duly attested copies of this resolution shall be immediately transmitted to the President of the Senate of the United States, to the Speaker of the United States House of Representatives, to the Secretary of the Senate of the United States, to the Clerk of the United States House of Representatives, and to each Member of the Congress of the United States from this State.

ADOPTED BY THE HOUSE OF REPRESENTATIVES
June 23, 1965

SPEAKER OF THE HOUSE OF REPRESENTATIVES

ADOPTED BY THE SENATE
June 24, 1965

PRESIDENT OF THE SENATE

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

Memorandum

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TO : Mr. Felt

DATE: October 20, 1965

FROM : H. L. Edwards

SUBJECT: AMERICAN LAW INSTITUTE ADVISORY COMMITTEE ON PREARRAIGNMENT PROCEDURES; AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE ADVISORY COMMITTEE ON THE POLICE FUNCTION; COMMITTEE MEETINGS, NOVEMBER 18 - 21, 1965; NEW YORK, NEW YORK

I have received announcements of the fact that the two captioned committees on which I represent the Bureau as a member will hold meetings at The Westbury Hotel, New York City, Thursday, November 18, through Sunday, November 21.

The Advisory Committee on Prearraignment Procedures will consider the revised draft of the model code which should contain numerous changes as a result of the committee's suggestions at its last meeting in Atlantic City last June. This is the committee of which [redacted] is the reporter in charge of coordinating the work.

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The other committee is U. S. District Court Judge Richard B. Austin's committee to formulate standards for the police function as a part of the American Bar Association's criminal justice study.

RECOMMENDATION:

That I be authorized to confirm my attendance as indicated. If approved, this memorandum should be returned to the Inspection Division for appropriate action.

Confirmation mailed 10/25/65 HLE

REC-74 94-1-369 NOV 18 1965

EX-117

16 NOV 17 1965

1 - Mr. Casper (Attention: Mr. Dalbey)
1 - Mr. DeLoach

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NOV 22 1965

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December 15, 1965

RED X

94-1-369-2004

SEARCHED

Mrs [redacted]
New York, New York 10028

Dear Mrs [redacted]

I have had the opportunity to read your letter of December 7th to Mr. Cartha D. DeLoach, and the interest which prompted you to write is indeed appreciated. I am glad that your husband enjoys the television presentation, "The FBI."

I would like to point out that I have not spoken before the American Bar Association since 1958 and on that occasion I did not make any remarks along the lines attributed to me by the speaker whom you mentioned. The American Bar Association Journal did print in its February, 1962, issue my article entitled "Shall It Be Law or Tyranny." It is a pleasure to enclose a copy of this article. You may be particularly interested in my comments set forth on page 4.

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FBI

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COMM-FBI

Sincerely yours,
J. Edgar Hoover

Enclosure

1 - New York - Enclosure

NOTE next page
JRP:cao (6)

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Mrs. [redacted]

NOTE: Bufiles reflect Mrs. [redacted] corresponded with the Director on 9-20-65. Our letter of 9-27-65 expressed appreciation for her complimentary remarks. Mrs [redacted] mentioned by correspondent, is on the Special Correspondents' List. The Director has not appeared before the American Bar Association since 1958. The Director's article, "Shall It Be Law or Tyranny," was reprinted in the February, 1962, issue of the "American Bar Association Journal."

Mrs. [redacted] New York, New York 10028

December 7, 1965

Mr. Cartha D. De Loach
Federal Bureau of Investigation
Washington, D. C.

Dear Mr. "Deke",

I am writing you at the suggestion of a mutual friend, Mrs. [redacted] of New York City. To identify myself further, I am the wife of the editor of "Barron's Weekly."

This afternoon I listened to a lady speak on the subject of "Russia and the Churches." She prefaced her remarks by referring to a speech delivered by Mr. J. Edgar Hoover before the American Bar Association in which he allegedly urged his audience to be on guard against anti-Communists who do not have the true facts about Communist activity in this country. If a copy of this speech is available, I should appreciate your sending it along to me at your convenience.

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Sincerely yours,

[redacted]

P.S. My husband is a great fan of the new F.B.I. series on television.

ack 12-14-65 JRP/

ENCLOSURE

EX-103 REC 7 94-1-369-2004

5 DEC 17 1965

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

In Reply, Please Refer to
File No.

WASHINGTON 25, D. C.

"THE LAW AND THE LAYMAN"
ADDRESS BY JOHN EDGAR HOOVER
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
BEFORE JUDICIAL ADMINISTRATION SECTION
AMERICAN BAR ASSOCIATION
LOS ANGELES, CALIFORNIA
AUGUST 25, 1958

The American Bar Association for eighty years has served notably the legal profession and the citizens of this Nation. During this period it has become firmly established as a bulwark dedicated to upholding and preserving the Constitution of the United States. It has steadfastly advanced the great historic goals of our dynamic American society. It has kept pace with the changing times, while holding true to the fundamental principle that justice is based upon law and order.

There is no more important Section in the American Bar Association than the Judicial Administration Section, whose broad objective is the improvement of the administration of justice. This objective is not solely a concern for the lawyer or the judge, but it is also of paramount interest to the layman and the law enforcement officer.

The history of mankind has been marked by frequent disagreement. This is particularly true in regard to law. Much of this disagreement has emanated from the conflict between man's ideals and the frailty of human nature. As a result, many diverse views have been expressed on the relationship between law and man. However, I am sure that there will be no disagreement among us on Aristotle's view that "good law means good order."

The application of law is the practical expression of man's desire for order. Every improvement in the administration of law represents a vital contribution to man's search for the orderly existence befitting his

94-1-369-2004
ENCLOSURE

rational nature. Since peace can be described as "the tranquillity of order," our efforts here can contribute to a world free from domestic and international strife.

At no other time in history has it been more imperative to establish order and peace in the world than it is today. Man always has possessed the capacity to destroy himself. Today, he possesses the capacity to destroy the world. He has the responsibility to formulate, interpret, and enforce laws not only to shape the future of mankind, but also to insure his preservation.

The future of the human race was never more in jeopardy than it is today. A powerful, lawless conspiracy--world communism--remains a constant and serious menace to not only the international rules of law but to civilization itself. The recent execution of former Premier Imre Nagy of Hungary, as horrifying as it was to the Free World, was merely one of a long list of treacherous acts by the rulers of the Kremlin. Brutality and slaughter, the abiding essence of communism, struck with Hitlerian savagery. This flagrant disregard of the pledged word once again exposed the brutality and arrogant treachery of the lawless communist society.

A recent study of nearly one thousand treaties indicated that in a 38-year span, the Soviet Union had broken its word to virtually every country to which it had given a signed promise. The word of the Kremlin has been and remains a counterfeit commodity.

The tyrants of the world communist movement are boasting that the Soviet Union is now powerful enough to wage the most devastating war ever known. Combine this with the treachery, deceit, and illegal acts which have marked the communists' rise to power. Add to it the recent warning of Nikita Khrushchev that "We Bolsheviks are a ravenous people. . . . We want more and more." Clearly, communist imperialism constitutes a threat to the continued existence of mankind, without parallel since the beginning of time.

The very fact that world communism has the potential to destroy the Free World can be traced in large measure to the lawless subversive and espionage activities by communists in our own and other countries. Communist agents are at work in our Nation today, at this very moment, both openly and secretly, attempting to obtain our latest technological and scientific developments. At the same time, they are taking advantage of every legal technicality to nullify our security precautions.

The Communist Party in the United States attempts to foster the myth that it is a legitimate political party operating completely independent of foreign control. Nothing could be further from the truth, despite the naive declarations and beliefs of some Americans. Statements and actions by leaders of the party within the past year leave no doubt that American communists are an integral part of the international communist conspiracy which was born in tyranny and which has been nurtured by tyranny.

Next to subversion itself, the greatest danger this country can face is an attitude by its people and officials that our way of life is so well established that nothing need be done to protect it. The doctrine of "unassailable" institutions induces a dangerous apathy. We cannot afford to accept it.

Are we prepared to meet the threat which the lawless force of world communism presents to the future of mankind? To be prepared, our Nation must be as representative of law and order as world communism is of lawlessness and disorder. But, at the very time that it is most imperative for us to evidence a mounting respect for law and order, we are forced to concede an ever-growing national disregard for it. The moral fibre of the Nation is growing weaker, not stronger, at this most crucial period in world history.

Despite remarkable progress in the science of crime detection and the best efforts of law enforcement, the crime problem in our country continues to grow at an alarming rate. In the postwar years, crime has grown steadily from 1,685,000 major offenses in 1946 to an all-time record of nearly 2,800,000 in 1957. Since 1950, crime has increased four times as fast as our spiraling population.

Each year, our Nation pays a shocking ransom to the underworld. The estimated annual cost of crime now totals a staggering 22 billions of dollars, or $128 for every man, woman, and child in the United States. Even though there have been vast increases in our expenditures for education to meet our growing needs, the amounts spent are more than matched by the cost of crime. Crime costs $1.11 each year for every $1.00 spent on education. For every dollar we contribute to churches, crime costs us $12.

My concern over the increase in total crime and the toll in dollar costs is matched by my concern over the disturbing growth of juvenile crime. In 1957, persons under 18 years of age represented 53 per cent of all arrests reported for robbery, auto theft, burglary and larceny.

The greatest participation of youths under 18 was in connection with auto thefts, where they represented 67.6 per cent of all arrests. Auto theft has proved to be a training ground for more serious crimes. With rare exception, the most vicious hoodlums in America today began their careers as car thieves.

Figures from city police reports show that since 1952 the population group under 18 years of age has increased 22 per cent, while arrests of persons under 18 have increased 55 per cent. This is graphic evidence that this major problem is no longer one of youthful offenders, but rather one of young criminals.

All too often, in discussions of juvenile misbehavior, the smog of ill-considered theories, unrealistic contentions and gushing sentimentalism obscures the basic facts. We have tried the practice of overindulgence, and it has failed. In the interest of self-preservation, it now is time for sterner measures.

Just how intolerable the juvenile crime situation has become is shown by the total disregard for authority recently exhibited by a group of teen-age hoodlums in a large eastern city. This group, ranging in age from 15 to 19, created turmoil when they invaded the corridor of the municipal court and threatened witnesses waiting to testify in juvenile cases. These "terrorists," as the judge called them, were identified as part of a gang that had beaten a witness in the same corridor the previous week.

Tyranny and terror were not meant to be the governing factors in man's existence. Rule by these methods is sustained by fear and by a misunderstanding of the real meaning and purpose of law in a society. We can combat tyranny and terror by creating a deeper understanding of, a greater willingness to abide by, and a firmer confidence in the law. A greater understanding of the law derives from the individual's full knowledge of both his rights and his obligations under the law as a member of an orderly society.

Our concept of freedom stresses the rights of the individual. However, our founding fathers recognized that freedom could not be completely unlimited. They recognized that unconditional liberty would inevitably give rise to anarchy, terror, and chaos. Freedom without any limitation would have led to the abrogation of the very rights they were attempting to insure. This is why our freedom is a freedom under law. This is why our laws are enacted to protect and preserve both the individual and society.

The right of individual freedom, as all other rights, imposes definite obligations, not only on the individual but also on society. The founders of our Nation recognized this dual responsibility and visualized law as performing a dual function. In establishing our Nation, they drew upon law to create the form of government under which our Nation has grown and prospered. At the same time, they looked to law as the guardian of the rights of the individual against infringement by the government which they established. Through the Bill of Rights, they insured the individual citizen against abuses by his government. This emphasis on the rights of the individual provides a dramatic contrast between our government and all totalitarian regimes.

The rights which we all enjoy place numerous responsibilities on each of us. Above all, we must protect and defend the priceless heritage of freedom wrested from the subjugations of the past. We must exercise our individual rights as the most effective way of insuring that they will be preserved for future generations. We must respect the limitations placed by law on our individual liberties in order to guarantee the rights of all individuals and those of society. We must obey both the spirit and the letter of the law.

The citizen has the affirmative obligation to furnish information concerning violations of law and to be a willing witness. Often, officials must forego prosecution against the criminal offender because the citizen is unwilling to discharge this vital responsibility.

An equally vital responsibility for the citizen in the administration of justice involves the privilege of jury service. Reluctance to assume the obligations of citizenship often has thwarted the ends of justice. The layman is afforded an opportunity to directly participate in the law enforcement processes of government. Under our system of jurisprudence, the jury accepts the rules of law set forth in the instructions by the court and determines the questions of fact within this framework. This is both a serious responsibility and an opportunity to render valuable service. The citizen who avoids jury service deprives himself of one of the most precious privileges of citizenship.

Freedom of speech and freedom of the press are basic liberties guaranteed by the Bill of Rights. Yet, these freedoms of expression are not unconditional. They must be exercised within the limits of common decency, with respect for the rights of others and with due regard for the general public safety. Failure to observe these conditions results in the perversion of our fundamental rights to freedom of expression.

There are those who, by irrational and unfounded criticism, either accidentally or deliberately corrode and undermine the very foundations of our Government. As a function of Government, law enforcement has frequently been subjected to scurrilous and unwarranted attacks. There have been loud and slanderous charges that law enforcement is gravely impairing the historic liberties of the people. The epithet, "Gestapo," has even been used as descriptive of our efforts. The record of law enforcement in our society refutes these baseless accusations. While the rights to freedom of expression must be defended to the end, the critic, in exercising these rights, has a corresponding obligation to be correct in his facts.

Nowhere is the problem of maintaining a balance between the rights of society and those of the individual faced in a more practical fashion than in the field of day-to-day law enforcement. Society must be protected from the criminal. Yet, the rights of the accused must be observed. Police power must be exercised for the benefit of society. But it must not encroach on the rights of the individual. Moreover, the protection of the innocent is as fundamental a principle of our legal system as is the apprehension of the wrongdoer.

Thus, law enforcement has a dual responsibility. It has a sacred trust to enforce the law impartially while meticulously observing the rights of citizens.

The division of responsibility among numerous law enforcement agencies through delegation of specific jurisdiction stems from a fundamental constitutional concept. Under our constitutional division of powers, approximately 90 per cent of crimes committed are within the investigative jurisdiction of local and state law enforcement. This constitutional concept has proved most effective in preventing the rise of any one agency into anything resembling a national police force. Moreover, it has focused individual responsibility where it belongs--at the local level.

The abdication of local community responsibility can lead only to disrespect for law and order. The local administration of justice accurately reflects the moral fibre of any community. Crime is essentially a local problem with local solutions.

Nowhere does the problem of maintaining the balance between the rights of society and those of the accused present more difficulty than in the area of appellate court review. In the final analysis, the courts must draw the line between the rights of the individual and the right of society to protect itself by punishing those who violate its laws. This is the problem of balancing the rights of a specific individual against the rights

of all other individuals in our system of freedom under law. Some balance must be maintained between the rights of the accused as opposed to the rights, not only of the victim, but of all other law-abiding citizens.

In 1883, Mr. Simeon Baldwin, former Governor of Connecticut and a founder of the American Bar Association, stressed that our laws must be interpreted in the true spirit of their meaning to maintain a proper balance between the rights of society and criminals. This warning given 75 years ago remains pertinent today.

Frequently, emphasis is placed on the rights of the accused to the obvious exclusion of the rights of law-abiding citizens. Carried to extremes, this tendency can actually infringe upon the freedom of all individuals--of society itself. In protecting the accused from abuses by the government, the rights of the law-abiding citizen and the innocent victim of crime who look to their government for protection must not be neglected.

The administration of justice is faced with complex problems. The inequities arising from disparities in sentences are well known. While there is a need for discretionary action by the courts, there is also a need for greater consistency in sentencing.

All of us are acquainted with the problem of congested court calendars and with the many remedies which have been suggested to alleviate this problem. The accused is entitled to a speedy trial. Society is entitled to the prompt administration of justice. One of the most effective deterrents to crime is the certainty of swift and impartial justice.

The final responsibility for protecting the innocent rests upon our courts. However, some courts, in discharging this responsibility, seem to be guided by a tendency to be overly solicitous of criminals. Misapplied leniency adds to the already serious problems in the administration of parole and probation. It also aggravates the rising problem created by the criminal repeater.

The ready reservoir of criminal replacements available through loopholes and abuses of our systems of parole, probation and other forms of clemency has been a most formidable handicap to the measures taken against expanding lawlessness. I wish to emphasize that I am not criticizing the humanitarian principle of parole and probation, but I most emphatically do criticize the administration of it when one sees repeaters constantly being released only to commit more serious crimes.

[redacted] Jr., Chairman of the House of Delegates of the American Bar Association, this year highlighted another problem in the administration of justice. He related several instances of the reversal of criminal convictions for absurd reasons. He cited, for example, the dismissal of an indictment of a man for drowning his wife and child, which did not specify the kind of liquid in which they were drowned, and a similar dismissal of the indictment of a hitchhiker for stomping a motorist to death, which failed to state that the murderer used his feet "with his shoes on." The confidence of the layman in the administration of justice obviously is shaken when learning of such hair-splitting rulings.

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The distinguished Judge Learned Hand expressed a realistic approach when he stated, "Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."

The Honorable Warren E. Burger, United States Court of Appeals, District of Columbia Circuit, in April, 1957, found cause to warn of what he considers ". . . an unfortunate trend of judicial decisions . . . which strain and stretch to give the guilty, not the same, but vastly more protection than the law-abiding citizen."

The late Justice Benjamin N. Cardozo of the United States Supreme Court so aptly stated, "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

When mere technicalities of procedure are magnified out of proportion to their actual function in the judicial process, justice is not served. The tendency to accentuate procedural detail in legal decisions has enabled lawbreakers to exploit technicalities and loopholes in the law to defeat the ends of justice.

One of the most vital of court responsibilities is to provide definite decisions on cases affecting individual rights. Law enforcement faces the daily task of protecting society while observing the rights of the individual. Such procedures as arrests, arraignments, searches and seizures, confessions, interrogations, and the collection of evidence are vital to effective law enforcement. At the same time, these procedures touch upon individual rights and must be accomplished with strict adherence to constitutional limitations in order to protect our freedom under law. There is no easy solution to this problem. There can be no handy yardstick which the courts can provide.

But, the courts can, [redacted] realistic comprehension of th[redacted]e crucial points, attempt to spell out as definitively and consistently as possible the limits within which law enforcement can operate without impinging unlawfully on individual freedom.

Freedom under law cannot be maintained without the ultimate safeguards provided by the courts. It also cannot be maintained without the faith of our laymen in our court procedures and decisions. To our laymen, therefore, it is essential that the courts continue to function in a free environment in order to fulfill their responsibilities to the citizens they serve. The preservation of our heritage of freedom depends upon this cornerstone of our democracy.

Time alone will tell whether or not this cornerstone will remain intact in the future. The future is the realm of the unknown for all of us. As we stand today upon its threshold we feel the powerful pull of this unknown, the awareness of its dangers and the stirring demands of its lofty peaks as yet unscaled in the social relations of man. On charting our course we find a number of complex problems facing both the legal profession and the layman:

> Lawlessness, to be met with intelligent and resolute action.
>
> Juvenile crime, which calls for the deepest understanding, discipline, and self-sacrifice in all of our local communities.
>
> Law interpretations, which require the immediate attention of our most brilliant legal minds.
>
> Judicial administration, which needs discernment, judgment and maturity for the solution of its problems.
>
> World communism, which must be combated by a reaffirmation of the positive, creative, dynamic, and democratic concepts rooted in the rule of law and in the inherent dignity and preciousness of every human being.

This is what our Nation faces in the future--a Nation which has been, since its inception, a beacon for the oppressed peoples of the world who are still struggling heroically to achieve freedom. Will we continue to be a beacon to these people? Will we light the way to freedom, security and peace under law for all mankind? These questions constitute the major challenge of our time.

To meet this challenge no confused, hesitant, indifferent and half-apologetic actions on our part will suffice. To meet this challenge we must have clarity of thought, dedication, confidence and positive actions. These can be achieved by deepening our convictions in, and by applying effectively to this Nation, the imperishable religious and moral values of western civilization which remain a living, fertile source of both our law and our justice.

December 9, 1965

94-1-369-

Lewis F. Powell, Jr.
Mosaic Building
Richmond, Virginia 23212

Dear Mr. Powell:

This is in response to your letter of December 2, 1965, to Inspector H. Lynn Edwards.

With reference to the "Time" magazine article referred to in your letter and specifically Judge Sobel's use of FBI statistics, your attention is invited to pages 6 and 7 of Uniform Crime Reports - 1964. The fact that most murders, as well as serious assaults, occur within the family unit or among neighbors and acquaintances does not necessarily mean that "a good supply of incriminating evidence" results. It is a fact that the offender in these impulsive-type attacks does frequently volunteer the truth. The relationship between the victim and the offender does not guarantee physical or other type evidence outside of a confession.

Your kind comments concerning my most recent address are greatly appreciated.

Sincerely yours,

J. Edgar Hoover

1 - Mr. DeLoach
1 - Mr. H. Lynn Edwards

NOTE: This is in response to the request in the Edwards to Felt memorandum 12-6-65 captioned "Lewis F. Powell, Jr., Immediate Past President, American Bar Association." Correspondent is on the Special Correspondents' List.

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OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27
5010-106

UNITED STATES GOVERNMENT

Memorandum

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TO : Mr. Felt

DATE: December 6, 1965

FROM : H. L. Edwards

SUBJECT: LEWIS F. POWELL, JR.
IMMEDIATE PAST PRESIDENT
AMERICAN BAR ASSOCIATION

Attached is a letter 12-2-65 from Lewis F. Powell in which he refers to the fact that he endeavored to have the Director's speech, "The Faith of Free Men," given before the Supreme Council of the 33° of Ancient and Accepted Scottish Rite of Free Masonry on October 19, 1965, reprinted in the Readers' Digest. Powell indicates that Readers' Digest advises that "conflicting material" will prevent reprinting the Director's address.

Powell goes on to discuss that he noticed the 12-3-65 issue of "Time" magazine contains the story on criminal justice and he was particularly discouraged by the report of Justice Sobel (page 65) quoting FBI statistics. Powell would like to have some objective evaluation of Sobel's report, indicating it will surely be discussed by the American Bar Association's Committee and possibly the President's Commission on Crime.

It may be that the Crime Records Division would have some material useful to Powell in answer to his request for "some objective evaluation" of the Time article.

RECOMMENDATION:

That this matter be referred to the Crime Records Division for acknowledgement of Powell's request.

ENCLOSURE

Enclosures

ENCLOSURE

1 - Mr. DeLoach

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Ltr to Lewis F. Powell
12/9/65

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RICHMOND, VIRGINIA 23212
AREA CODE 703
MILTON 3-0141

December 2, 1965

FILE NO.

Inspector H. Lynn Edwards
Federal Bureau of Investigation
Washington, D. C.

Dear Lynn:

I was most disappointed to receive in the mail today a note from the Reader's Digest that "conflicting material" prevents reprint by the Digest of Mr. Hoover's splendid address.

I have some other ideas which I will follow up. Of all of his great statements in recent years, I consider his October 19 address as the most outstanding.

Changing the subject, I have just seen the story on criminal justice in the December 3 issue of Time magazine. It refers (on page 65) to a report by Justice Sobel of New York in which he quotes FBI statistics. I am sure I can obtain a copy of the Sobel report, but I would be particularly interested in having some objective evaluation of it. I am sure that it will be discussed by our ABA Committee and possibly by the President's Commission on Crime.

Sincerely,

Lewis

24/167

94-1-369-

ENCLOSURE

ENCLOSURE

THE READER'S DIGEST
PLEASANTVILLE • NEW YORK

November 30, 1965

Dear Mr. Powell:

According to our practice here, several staff members have looked over the J. Edgar Hoover address you submitted, but I'm afraid the consensus is against holding it for possible Digest reprint. Conflicting material is in preparation here.

Thank you nonetheless for your thought and for your interest in the magazine.

Sincerely,

Hobart Lewis

Mr. Lewis F. Powell
Hunton, Williams, Gay, Powell & Gibson
Electric Building
Richmond, Virginia 23212

EXECUTIVE EDITOR: HOBART LEWIS

ENCLOSURE

94-1-369-

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27
5010-106

UNITED STATES GOVERNMENT

Memorandum

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b7C

TO : Mr. A. H. Belmont

DATE: 10/18/65

FROM : W. C. Sullivan

SUBJECT: COUNTERINTELLIGENCE PROPOSALS BY THE NATIONAL STRATEGY INFORMATION CENTER, INC. INFORMATION CONCERNING

Civil disobedience related to national defense and spreading communist subversion on our college campuses are very real problems facing our Government and the FBI. The American Bar Association's Committee on Education Against Communism, whose Chairman is Morris I. Leibman, in cooperation with the National Strategy Information Center, Inc., headed by [redacted] are seriously working on a project toward the solution of this problem.

As Mr. Leibman and Mr. [redacted] see the problem, a trained disciplined elite composed of communist and radical elements is using pacifism as a weapon against our Government on behalf of Moscow, Peking, and the Viet Cong. The tactics of civil disobedience includes "sit-ins" of students and other youth on college campuses and at Army bases, the encouragement of these students and youth to tear up their draft cards and otherwise refuse military service, and the encouragement of acts of violence wherever possible.

The advocacy of civil disobedience is one of the main facets of the new radical movement which has emerged on American college campuses. This movement, characterized by protest demonstrations and riots on campuses across the nation, presents the Communist Party and other subversive organizations with an unprecedented opportunity for expanding their influence against youth. Communism in academic communities is a serious and difficult problem.

Both Leibman and [redacted] who are directing this project, are active and staunch friends of the Bureau. They have approximately $75,000 available with which to finance this project and sincerely want to accomplish something of marked benefit in combatting this serious problem.

The Bureau has been aware of this problem and, as you know, consideration was given to a program which planned some investigations

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1-Mr. Belmont; 1-Mr. Mohr;
1-Mr. DeLoach; 1-Mr. H. L. Edwards;
1-Mr. Sullivan

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on college campuses. However, this change in policy was not adopted because it was believed that the hazards to the Bureau outweighed the probable benefits.

The project of the American Bar Association in cooperation with the National Strategy Information Center, Inc., appears to present a vehicle through which the Bureau might accomplish some of its objectives in connection with the situation on college campuses. We would like to explore with Mr. Leibman and Mr. [redacted] the possibilities that this project presents to the Bureau. b6 b7C

It is believed that it would be advantageous to the Bureau to invite Mr. Leibman and Mr. [redacted] to a conference at the Seat of Government to sit down and go over the planning and the potential of this project to see what can be accomplished in combatting the expansion of civil disobedience and subversion on college campuses. In addition to Mr. Leibman and Mr. [redacted] it is suggested that Inspector H. L. Edwards, who is a member of the American Bar Association's Committee on Education Against Communism, appropriate Section Chiefs of the Domestic Intelligence Division and I participate in this conference.

RECOMMENDATION:

That, if you approve, Mr. Morris I. Leibman, Chairman of the American Bar Association's Committee on Education Against Communism and Mr. [redacted] head of the National Strategy Information Center, Inc., be invited to the Seat of Government to confer with appropriate personnel as indicated above, the time to be worked out later.

OPTIONAL FORM NO. 10
MAY 1962 EDITION
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5010-106

UNITED STATES GOVERNMENT

Memorandum

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TO : Mr. Casper

DATE: November 15, 1965

FROM : C. J. Moran

SUBJECT: AMERICAN LAW INSTITUTE ADVISORY COMMITTEE ON PREARRAIGNMENT PROCEDURES;

AMERICAN BAR ASSOCIATION MINIMUM STANDARDS PROJECT ADVISORY COMMITTEE ON THE POLICE FUNCTION

American Bar Association

Attached are eleven pages setting out comments on each of the sections listed in the American Bar Association's "Minimum Standards for Police Recruit Qualifications, Selection and Training."

RECOMMENDATION:

For information.

Enclosure

REK:srm
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1 - ENCLOSURE

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Section 1. Citizenship

EVERY POLICE OFFICER SHOULD BE A CITIZEN OF THE UNITED STATES.

We agree with the above and the fact that full citizenship status should be required.

Section 2. Residence

EVERY POLICE OFFICER SHOULD BE A RESIDENT OF THE UNITED STATES.

There is no question about the above statement. The comment on this section also deals with the controversial issue as to whether state and community residence should be required and conclusions that there should be no state and community residence requirement. We agree with this also and in fact, Training Document #71, "Standards, Recruitment and Selection of Patrolmen," devotes almost eight pages to pointing out the deficiencies in a pre-employment residence requirement.

The following statement from the Training Document summarizes the Bureau's position:

"One of the greatest deterrents to effective recruiting in the police service is that many departments require that an applicant must have resided in the city or other area policed by the agency for a certain number of years before any action can be taken on his application. This pre-employment residence requirement narrows the recruiting base and bars a number of well-qualified young men from further consideration merely because they live outside the city limits or in a neighboring state. The pre-employment residence requirement should not be confused with regulations which exist in most departments specifying that a police officer must reside within a certain area after he is appointed to the force."

Section 3. Age

THE MINIMUM AGE FOR A POLICE OFFICER SHOULD BE TWENTY-ONE AND THE MAXIMUM THIRTY-ONE YEARS UPON INITIAL APPOINTMENT.

We agree with the above statement and also generally with the comments on this section. In Training Document #71, we stated that twenty-one is the most desirable minimum age for recruits, and we also referred to the fact that some departments had cadet systems which will enable boys as young as 17 to be appointed as police cadets. We also pointed out that while the minimum age should be set at 21, the selection procedures should be kept so flexible that a person just meeting the minimum age is not hired unless it appears that he is mature enough for the position.

We also pointed out that many of the authorities in the field of police administration feel that the maximum recruiting age should be in the neighborhood of 30 and that there appears to be little justification for accepting candidates over 30 years of age for the position of patrolman. We pointed out that some departments made exceptions for applicants who had honorable service in the Armed Forces or experience in some other law enforcement agency. We also pointed out that investigative agencies which perform no patrol functions and require college training will normally have a higher maximum recruiting age. Higher maximum recruiting age is also necessary for the applicants who are required to have previous experience as a prerequisite to employment.

It should be noted that while Section 3 says the maximum age should be 31 years and while our Training Document says there is little justification for accepting candidates over 30, it is believed that the maximum ages are so close that no strong argument is justified here. We feel the maximum age should be 30, but the fact that the American Bar Association might want to set it at 31 is not disturbing.

With respect to Exhibit No. 1 which is mentioned in the comment on this section, the exhibit itself does not indicate its source. It is, however, substantially the same as a "Scoring Table for Age, Height, and Education" set forth on page 140 of the second edition of "Police Administration" by O. W. Wilson, published in 1963 by the McGraw-Hill Book Company, Inc., New York, New York.

The purposes of both tables are to give some flexibility in application of standards in order to avoid the elimination of well-qualified candidates who are slightly under the customary minimum requirements. For example, an applicant who had a college education could qualify even though he was slightly under the customary height standard. There is no question but that some degree of flexibility is required in applying standards.

Section 4. Individual qualifications

APPOINTMENT AS A POLICE OFFICER SHOULD BE BASED ON INDIVIDUAL QUALIFICATIONS. MANDATORY PREFERENCE FOR MEMBERS OF SPECIFIED ORGANIZATIONS SHOULD NOT BE REQUIRED.

We agree with the above and with the comment.

Section 5. Education

EVERY POLICE OFFICER SHOULD HAVE COMPLETED TWO YEARS OF COLLEGE UPON INITIAL APPOINTMENT. COURSE WORK IN POLICE SCIENCE OR RELATED SUBJECTS SHOULD BE EMPHASIZED.

It should be noted that the comment on this section says that a flexible scale should be utilized to permit acceptance of individuals with a high school diploma only but possessing other desirable qualifications. Reference is again made to Exhibit No. 1 which, as pointed out previously, was probably borrowed from O. W. Wilson's Table.

Training Document #71 devotes almost eight pages to the subject of educational requirements and states in part:

"The police administrator who is satisfied with any less than a high school education, or its equivalent for applicants, is taking a grave chance that employees with inadequate formal education may never be able to respond to the demands placed upon the patrolman in this decade."

We also pointed out in the Training Document that very few departments represented in the "National Academy Survey" accepted less or required more than a high school diploma or its equivalent. It is unrealistic for most departments to require college training in the year 1965 in view of the low salaries offered and the paucity of applicants. While it is realized that the American Bar Association's suggested requirement of two years of college is a flexible one as indicated in the

comments, it would be more realistic to set the minimum education at high school. This would represent a compromise between the high school education or its equivalent which is agreed to by some authorities and the American Bar Association's suggested requirement of two years of college.

Section 6. Intelligence

EVERY POLICE OFFICER SHOULD HAVE A MINIMUM INTELLIGENCE QUOTIENT OF 115 AS DETERMINED BY A STANDARD INTELLIGENCE TEST.

We agree with the comment on the section that acceptable candidates should clearly demonstrate above-average intelligence. We are not in a position to recommend any specific type of test.

Section 7. Psychological Testing and Evaluation

A PSYCHOLOGICAL EXAMINATION SHOULD BE ADMINISTERED AND EVALUATED BY A COMPETENT PSYCHOLOGIST OR PSYCHIATRIST TO EVERY POLICE OFFICER CANDIDATE BEFORE INITIAL APPOINTMENT.

We agree with the above section, and Inspector Edwards should be aware of the following statement which appears on page 98 of Training Document #71:

"The subject of personality testing is highly controversial and FBI instructors should make no recommendations concerning this procedure. The June 4, 1965, issue of "The Washington Post," Washington, D. C., stated that the U. S. Civil Service Commission had banned Federal agencies from using personality tests except when such tests are requested by a qualified psychiatrist or psychologist in connection with medical determinations for employment or fitness for duty."

Section 8. Physical Requirements

(a) Height.

EVERY MALE POLICE OFFICER SHOULD HAVE A MINIMUM HEIGHT OF FIVE FEET NINE INCHES AND A MAXIMUM OF SIX FEET FOUR INCHES.

The comment on this section indicates that flexibility should be used and refers again to Exhibit No. 1, which is in all probability based on O. W. Wilson's Table.

As pointed out in Training Document #71, the suggested minimum height requirement is in the neighborhood of 5'8" or 5'9" and it seems to us that the minimum should be 5'8" rather than 5'9". The reasons usually given for maximum height requirements are that the extremely tall man might be suffering from some disease or be awkward; the difficulty of procuring uniforms for the abnormally tall; and the difficulty the abnormally tall man would have entering, riding in, and leaving the police car. Flexibility is very necessary here, and care should be taken in setting up any rigid maximum height requirement to insure that splendid officer material is not arbitrarily excluded just because some applicants are unusually tall.

(b) Weight.

EVERY MALE POLICE OFFICER SHOULD WEIGH A MINIMUM OF 150 POUNDS OR HAVE A WEIGHT IN PROPORTION TO HIS HEIGHT.

The comment on this subsection shows that the proper relation of weight to height should be determined by the examining physician and by the agility test. We agree with the statement that the weight should be in proportion to the height. We do not agree that every male candidate should weigh a minimum of 150 pounds. Our own weight charts show a man 5'9" with a medium frame could have a range from 142 to 156 pounds. We believe the minimum of 150 pounds as cited by the American Bar Association is too rigid.

(c) Medical Examination.

A COMPREHENSIVE MEDICAL EXAMINATION SHOULD BE GIVEN EVERY POLICE OFFICER PRIOR TO APPOINTMENT.

We agree with the statement, and we have pointed out in Training Document #71 that the department should work out in advance with the examining physician the standards to be used in the examination and that the physician must be advised of the rigid requirements of the police service so that he will not use standards applicable for other city positions in examining applicants for patrolmen.

(d) Physical Agility.

A PHYSICAL AGILITY TEST SHOULD BE REQUIRED OF EVERY POLICE OFFICER PRIOR TO APPOINTMENT.

The above recommendation is, of course, desirable and is practiced by quite a few departments. It should be pointed out that some departments, while they do not afford this test prior to appointment, require that the individual pass the test before he is allowed to graduate from the police academy. The reason for this is some departments feel that while a candidate might not be in tip-top physical condition at the time of application, a regular exercise routine during recruit training would bring him around to the point where he could pass these tests.

Section 9. Oral Interview

AN ORAL INTERVIEW OF ALL OTHERWISE QUALIFIED POLICE OFFICER CANDIDATES SHOULD BE CONDUCTED TO DETERMINE THEIR SUITABILITY WITH REGARD TO PERSONALITY, APPEARANCE, BEARING AND ATTITUDE TOWARD POLICE WORK.

We agree with the above statement and with the comments on this section.

Section 10. Character investigation

A THOROUGH CHARACTER BACKGROUND INVESTIGATION SHOULD BE CONDUCTED ON EVERY POLICE OFFICER CANDIDATE PRIOR TO APPOINTMENT.

The over-all aim of the background investigation should be to determine the applicant's qualifications and suitability for law enforcement employment and whether or not his employment would constitute a departmental risk.

The specific objectives of the investigation are to determine the applicant's character, loyalty, associations, qualifications and ability.

In addition to the items listed on pages 10 and 11, it is believed that the investigation should also include the following:

1. Review of applicant's Military Service Record and/or his Selective Service Record.

2. Interviews with social acquaintances of applicant.

3. Examination of appropriate credit association files in cities where applicant has lived and worked.

4. Concerning applicant's relatives, the investigation should determine their character and general reputation. Police files should be checked in those cities where these relatives live and work. In some instances, it would be advisable to check credit records. Any derogatory information should be thoroughly developed and a determination made as to the degree and nature of the relative's association with the applicant.

With regard to Exhibit #2, the Personal History Questionnaire, it is noted this questionnaire does not include the following:

1. Social Acquaintances

2. Statement concerning membership in subversive organizations

Inspector Edwards could consider the advisability of making a Bureau application form available to the committee.

Section 11. Probation

EVERY POLICE OFFICER SHOULD BE REQUIRED TO SERVE A PROBATIONARY PERIOD OF NOT LESS THAN TWELVE MONTHS BEFORE FINAL APPOINTMENT.

We agree with the above statement and the comment.

Section 12. Training

POLICE RECRUITS SHOULD RECEIVE TWELVE WEEKS OR 480 HOURS OF BASIC POLICE TRAINING. IN NO CASE SHOULD LESS THAN 200 HOURS OF TRAINING BE ACCEPTED AS A MINIMUM STANDARD.

We find nothing objectionable in any of the materials or conclusions drawn from the materials. Observations regarding the need for more training for all levels of local law enforcement are valid and certainly desirable; it is doubtful the desired status can be accomplished immediately; progress in the past two years in states enacting police training legislation is reassuring, but there is still a long way to go.

It is suggested that the American Bar Association be careful about strongly advocating extensive basic training courses, particularly on a mandated basis, or it will defeat what it is trying to accomplish by causing local law enforcement heads and municipal leaders, particularly in the small to medium-sized communities,

to adopt a "closed-mind" attitude. An example is New York State; it started with an 80-hour mandated basic training course with full knowledge that 80 hours are inadequate, but also knowing it was highly desirable that the bill not be defeated. The basic course now has been extended to 120 hours and plans are for it to be increased to 240 hours next year. Had the Act called for 240 hours training at the outset, it probably would never have become law.

To us, the most feasible plan would be to have at least mandated basic training in every state and enlarge on that foundation to in-service and command-level training programs. States must evidence interest in its law enforcement agencies and provide help whenever and wherever possible. All law enforcement heads desire training, or more training, for their personnel; most often, ways and means of implementing that desire present the problem. Also, too many local law enforcement agencies have no formalized plan for training their personnel; it is a "hit or miss" proposition, with no records being maintained regarding what training has been received by what personnel; attendance at training schools is voluntary, often on the individual officer's own time.

American Bar Association has pinpointed what is needed in law enforcement training; the hope is that their recommendations will be in the best interests of law enforcement and will be in the form of help to, instead of criticism toward, the profession.

OPTIONAL FORM NO. 10
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5010-106

UNITED STATES GOVERNMENT

Memorandum

Tolson
Belmont
Mohr
DeLoach
Casper
Callahan
Conrad
Felt
Gale
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

TO : Mr. Felt

DATE: November 12, 1965

FROM : H. L. Edwards

SUBJECT: AMERICAN LAW INSTITUTE ADVISORY COMMITTEE ON PREARRAIGNMENT PROCEDURES;
AMERICAN BAR ASSOCIATION MINIMUM STANDARDS PROJECT ADVISORY COMMITTEE ON THE POLICE FUNCTION

American Bar Association

As previously advised, I am attending the meetings of the American Law Institute's Advisory Committee on Prearraignment Procedures in New York, November 17 - 21, 1965, and in connection with that meeting there will also be a meeting of Judge Richard B. Austin's Advisory Committee on the Police Function.

In this morning's mail, I received the attached material which will be the subject of discussion at Judge Austin's Committee which consists of proposed minimum standards for police recruit qualifications, selection and training. In view of the importance of this subject, I feel the attached material should be carefully reviewed by the Training Division and pertinent criticisms and comments be furnished me for my use in the Committee's discussion. The material should be returned to me no later than at the close of business Tuesday, November 16.

RECOMMENDATION:

That this memorandum and its enclosures be referred to the Training Division immediately in line with the foregoing.

1 - Mr. Casper

Enclosures detached & handled separately

HLE:mbk
(4)

REC 133 94-1-3169-2006

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57 JAN 13 1966

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5010-106

UNITED STATES GOVERNMENT

Memorandum

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Tele. Room
Holmes
Gandy

TO : Mr. W. C. Sullivan

DATE: 10/7/65

FROM : F. J. Baumgardner

1 - Mr. Belmont
1 - Mr. Felt
1 - Mr. H.L. Edwards
1 - Mr. Sullivan
1 - Mr. Baumgardner
1 - Mr. Reddy

SUBJECT: AMERICAN BAR ASSOCIATION
FEDERAL LEGISLATION AND
NATIONAL ISSUES

Memorandum from H. L. Edwards to Assistant Director Felt, 9/30/65, requested the Domestic Intelligence Division and other divisions to review pertinent sections of "Blue Book," the publication of the American Bar Association which contains policy resolutions on Federal legislation and national issues and which the association is updating. Mr. Edwards' memorandum requested that any pertinent information be furnished to him for transmittal to the Washington office of the American Bar Association.

The portion of "Blue Book" to be reviewed by the Domestic Intelligence Division contains the following resolutions:

(1) A resolution approved by the Board of Governors on 10/30/59 recommending enactment of legislation to empower the Secretary of State to deny passport facilities to individuals whose activities are calculated to further the international communist movement; to endanger the national security; or to seriously impair the conduct of foreign relations of the United States.

COMMENT:

EX-114 REC-34 94-1-369-2007

Effective passport legislation of the type recommended by the American Bar Association has, for several years, been included in the Bureau's legislative program. Legislation of this nature is all the more necessary since the Supreme Court in the Elizabeth Gurley Flynn and Herbert Eugene Aptheker cases (decided in June, 1964) held the Passport Sanction (Section 6) of the Internal Security Act of 1950 unconstitutional. Accordingly, there is no present legislation which prevents members of the Communist Party, USA, from engaging in foreign travel except to certain areas designated by the State Department as subject to communist control. Although numerous bills covering legislation of this nature have been introduced in prior sessions of Congress, none has been introduced during the current session.

JAN 24 1966

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2 - ENCLOSURE

TEN

(2) A resolution, passed in 1952, expressing the approval of the American Bar Association of the continuing investigations and hearings conducted by the House Committee on Un-American Activities and the Senate Internal Security Subcommittee into the activities of the Communist Party, USA, its members and followers.

COMMENT:

None.

(3) A resolution, passed in 1959, opposing the enactment of legislation aimed at limiting the jurisdiction of the United States Supreme Court and recommending that any weaknesses in the internal security of the United States caused by the decisions of the Supreme Court be remedied through appropriate legislation enacted by the Congress.

COMMENT:

None.

(4) A resolution, not dated, recommending that Congress enact the following specific legislation to remedy certain decisions of the Supreme Court:

(a) Legislation to amend the Smith Act of 1940 to make it a crime to intentionally advocate overthrow of the United States Government.

COMMENT:

Legislation of this nature has, for several years, been included in the Bureau's legislative program. No such legislation has been introduced, however, during the present or last few sessions of Congress.

(b) Legislation to establish the right of each branch of Government to require, as a condition of employment, that no employee shall refuse to testify before a Congressional Committee or an officer of the Executive or Judicial Branch of Government with respect to communism or communist front or other subversive activities.

 CONTINUED - OVER

COMMENT:

While legislation of this nature is not included in the Bureau's legislative program, we would have no objection to its enactment.

(c) Legislation to prohibit aliens awaiting deportation from engaging in activities similar to those on which their deportation orders were based and to invest the right in the Executive Branch of Government to interrogate such aliens concerning their subversive activities and associates.

COMMENT:

Although legislation of this nature is within the primary jurisdiction of the Immigration and Naturalization Service, we would certainly have no objection to its enactment since there are several Communist Party functionaries who are under deportation orders who have continued to actively engage in Communist Party affairs.

(d) Legislation to amend the Foreign Agents Registration Act to require the labeling of political propaganda sent into the United States by agents of foreign principals who are situated outside the limits of the United States.

COMMENT:

Although legislation of this nature has not been included in the Bureau's legislative program and would be practically impossible to enforce, we would have no objection to its enactment. The attention of the American Bar Association might be directed to the recent Supreme Court decision in the Corliss Lamont case in which the court struck down as unconstitutional a postal regulation empowering the Post Office to hold up delivery of obviously foreign political propaganda and to make the addressee specifically request delivery.

 CONTINUED - OVER

(5) A resolution, not dated, recommended that the House Committee on Un-American Activities and the Senate Internal Security Subcommittee continue to investigate matters relating to national security and to maintain close liaison with the various intelligence and security agencies and with the Attorney General so that the Committees might be aware of the legislative needs of the Executive Branch of the Government.

COMMENT:

None.

RECOMMENDATION:

That this memorandum be routed to Mr. H. L. Edwards pursuant to his request.

October 7, 1965

AMERICAN BAR ASSOCIATION
FEDERAL LEGISLATION AND NATIONAL ISSUES

In connection with Mr. Edwards' memorandum of 9-30-65 concerning the efforts to update certain policy resolutions of the American Bar Association (ABA) on Federal legislation and national issues which the ABA has previously officially taken, the following is furnished in connection with the recommendations as to Federal Employee Security:

1. ABA RECOMMENDATION

Whereas, the Association believes that employment by the Federal Government is a privilege and not a right.

COMMENT

This language closely follows the language of Executive Order 10450 which established the current Federal Employee Security Program in which reference is made to ".. persons privileged to be employed in the departments and agencies of the Government.." and ".. all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government.." This is a sound statement on the part of the ABA with which the Bureau agrees.

2. ABA RECOMMENDATION

Whereas, the Association believes that the American public is entitled to the service of loyal and suitable employees without regard to whether employed in sensitive or nonsensitive government positions.

COMMENT

The language again closely follows the language of Executive Order 10450 where it is stated: "Whereas the interests of the national security require that all persons privileged to be employed in the departments and agencies of the government shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States."

The Bureau's position, as has been stated to the Department of Justice, is that any action, which will prevent subversives or questionable characters from being employed in a sensitive or nonsensitive position in the Federal government, is highly desirable. The Bureau agrees with the language of the ABA.

RHR

ENCLOSURE
94-1-3117-2007

3. ABA RECOMMENDATION

Whereas, the Association believes that all employees of the government are entitled to due process of law in the consideration of loyalty and suitability;

Now, therefore, be it resolved, that the Association recommends to the Congress the enactment of comprehensive legislation covering Federal Civilian Employee Loyalty and Security Discharge Procedures and procedures to apply to application cases under which employment is refused on loyalty or security grounds. Such legislation shall establish specific standards and criteria defining sensitive and nonsensitive government positions and prescribe adequate administrative procedural safeguards for the hearing and review of such cases, including a broad, but not unlimited, right of confrontation.

Resolved, that the Association authorize the Chairman of the said Special Committees jointly to appear before the committees of the Congress to state the position of the Association in conformity with the foregoing resolution.

COMMENT

The Federal Employee Security Program is a controversial field because of conflicting demands of national security and fairness to the individuals involved in this program. This is shown in the language of the ABA where first it is stated that government employment is a "privilege" but a "privilege" to be protected by due process of law, adequate administrative procedural safeguards, review of cases and broad, but not unlimited, right of confrontation.

It is felt that the ABA in making its recommendation that all employees of the government are to be entitled to due process of law in the consideration of loyalty and suitability, opens up the field of government-employee relations to many involved and far-reaching questions.

The guarantee of due process found in the Fifth Amendment of the Constitution declares that no person shall "be deprived of life, liberty or property without due process of law." The courts have recognized the difficulty of defining "due process of law." What is due process depends on circumstances varying with the subject matter and the necessities of the situation.

Due process of law could conceivably encompass judicial review of administrative determinations made under the Federal Employee Security Program by the employing agency and

if such review would allow appeals solely on the merits of the case and not some constitutional or other question of law, the Judicial Branch would then, in effect, be "assisting" the Executive Branch in administering a personnel program involving Executive Branch employees.

Due process of law is not required at the present time in the adjudication of cases investigated under the Federal Employee Security Program. The courts have shown a tendency to expand the rights of individuals subject to this program with its statements concerning standards of "simple justice" and "fundamentals of fair play." It might be noted that the United States Court of Claims in Curtis W. Garrott v. United States January 22, 1965, stated that the law is now clear "that an agency of the Federal government cannot, without permitting cross-examination and confrontation of adverse witnesses, take detrimental action against a person's substantial interests on loyalty or security grounds - unless, at the least, Congress (or the President if he is the source of power) has expressly authorized the lesser procedure."

A study by the Department of Justice in 1961 revealed that security officers believed they have no security problems under the Federal Employee Security Program which are insurmountable. The Department of Justice felt that existing authority in this field was adequate and that no new legal authority was necessary at that time and that nothing should be done to "rock the boat" in this field. In that study the Department of Justice continued as follows:

> "It is our opinion, concurred in by representatives of the Civil Service Commission and representatives of those departments and agencies most directly concerned, that the promulgation of a new program with the concomitant problems of interpreting and applying new criteria while trying to avoid procedural and Constitutional pitfalls would neither increase the efficiency of operations nor serve the interests of national security."
>
> The Department added:
>
> "Although it is impossible to provide confrontation in most of these cases, the government must not be helpless to protect itself against the threat of infiltration by persons who support International Communism. The public interest in our government protecting itself, we believe, is overriding and

must be considered sufficient in proper cases to permit some infringement upon the Constitutional rights of the employee to full confrontation."

In testimony in executive session before the Senate Internal Security Subcommittee on 6-25-63 J. Walter Yeagley, Assistant Attorney General, Internal Security Division, stated that the field of personnel security is a difficult area because of several court decisions. He stated the administration had thoroughly examined this problem and it was agreed "it would not seem feasible to propose any substantive or important changes. It might do more harm than good."

In a memorandum to the President dated 12-18-61, prepared as a result of meetings by representatives of the Department of Justice, Bureau of the Budget and Civil Service Commission, it was stated:

> In general, the program established by E. O. 10450 (1953) and covering federal employees is operating effectively. Although rarely used since 1956, the summary dismissal authority under this Order may be exercised by agency heads in the case of incumbents of sensitive positions. But ordinarily, necessary action has been taken under normal civil service procedures. Suitability standards applied by the Civil Service Commission for personnel entering non-sensitive positions provide reasonable assurance of adequate protection of the Federal service. In view of current operations, it is judged desirable to avoid major program changes which might create uncertainty among the more than two million employees affected by the program and possible public relations and agency operating problems.

This memorandum was approved by the President.

In February, 1965, President Johnson appointed Chairman John Macy of the Civil Service Commission to head a study of security practices under Executive Order 10450 in relation to Government personnel. The fact that this study had been requested is to be closely held and is to be carried on in a "very low key." The study group is composed of high officials of the Department of Defense, Bureau of the Budget and the Department of Justice. A draft prepared by this study

group has been reviewed by the Bureau. This draft reveals that it was concluded that it has not been demonstrated that any improvement could actually be effected in the current standards and criteria of Executive Order 10450 and recommended that the program should remain undisturbed regarding the following: Procedures in cases involving adverse action; respective rights of applicants and employees; availability of confrontation and cross-examination in individual cases.

CONCLUSION

As pointed out above, the Federal Employee Security Program is a most controversial field. This is reflected in the recommendation of the ABA which first talks about Government employment being a privilege and then complicating Government-employee relations and termination proceedings by enshrouding this privilege with the requirements of due process of law and adequate administrative procedural safeguards for the hearing and review of such cases including a broad, but not unlimited, right of confrontation. The requirement of due process of law, which the courts have had difficulty in defining, would tend to make a Federal personnel program cumbersome and difficult to operate from the point of view of Government efficiency and national security. Broad, but not unlimited, confrontation would lead to controversy without sharper definition. As pointed out above, the Department of Justice, the President in 1961, and the draft prepared to date by President Johnson's study group, are not in favor of any change in the program at this time. These documents have not been published and are not available, to our knowledge, to the general public. It is not believed that the Bureau should inject itself into this controversial field at this time.

From an investigative point of view, the Bureau under the Federal Employee Security Program has continued to investigate the occupants of sensitive and nonsensitive positions where there are disloyal allegations. Our reports are furnished to the Civil Service Commission (CSC) for disposition and adjudication by CSC or the employing agency under applicable regulations. The Bureau's position under this program, as it is in other Government security programs, is that we restrict the concealment of identities of sources furnishing us information to those absolutely necessary instances and we have made and continue to make every effort to furnish the names of individuals willing to testify wherever possible. We, of course, must respect confidences reposed in us by persons furnishing us information or otherwise

such sources would soon be lost. In fulfilling our responsibilities under this program, the FBI attempts by careful, exact and fair investigations to protect the national security and individual civil liberties. We are as interested in proving that the allegations which are the basis for our investigation are unfounded as we are in proving through the facts developed in our investigation that an individual is unsuitable for Government employment. It is realized that there must be the best possible balance between the demands of national security in protecting the Government against the threat of infiltration by persons who support international communism and the protection of individual rights.

In fulfilling our responsibilities under this program and fulfilling our responsibilities in the field of national security, we must of necessity disseminate pertinent information coming from sources who have furnished reliable information in the past, even though the sources furnishing the information are not available to testify at this time and are concealed in our reports. We would be most derelict in our duty if we failed to call this information to the attention of the interested agencies thus jeopardizing national security. Individuals who are active in the communist underground or who are active in other clandestine subversive activities do not broadcast their activities and it is most difficult to develop information concerning their subversive activities. Certainly neighbors and other associates who are not part of the conspiracy very seldom would be able to furnish corroborating information concerning the subversive nature of the activities on the part of the individual under investigation. The requirements of due process of law and broad, but not unlimited, right of confrontation may tend to weaken the ability of the Executive Branch of the Government to protect itself against infiltration by subversive persons.

It would not be in the best interest of the Bureau to voice objection to the statements in the ABA recommendation concerning due process of law, review of such cases (which is not spelled out but may possibly include judicial review), or the broad, but not unlimited, right of confrontation. Certainly many agencies, especially the defense agencies, might very well voice strong objection to what would appear to be legislation restricting them in carrying out an effective personnel security program to insure that their employees are loyal, suitable and, as set forth in Executive Order 10450, their employment clearly consistent with the interests of the national security.

4-572 (Rev. 7-18-63)
OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27
5010-106

UNITED STATES GOVERNMENT

Memorandum

TO : The Director

DATE: 1-21-66

FROM : N. P. Callahan

SUBJECT: The Congressional Record

Pages 688-692. Senator Tydings, (D) Maryland, placed in the Record an address delivered by William L. Marbury, president, Maryland State Bar Association, at the meeting of the Association on January 14, 1966. Mr. Marbury spoke concerning the failure of the legal profession to live up to its responsibilities. He cites several cases of lawyers refusing to accept cases due to local feelings. He went on to state "This is not so surprising when you remember that a well-known Alabama lawyer was subsequently thrown out of one of the most prominent law firms in the State because he agreed to defend an FBI informer in a suit for counsel fees brought for services rendered in a case in which the agent had been indicted and had given evidence against his codefendants charged with the murder of a civil rights worker."

American BAR ASSOCIATION

Original filed in: 66-1731-2822

94-1-369

94-1-369
NOT RECORDED
26 JAN 28 1966

In the original of a memorandum captioned and dated as above, the Congressional Record for 1-20-66 was reviewed and pertinent items were marked for the Director's attention. This form has been prepared in order that portions of a copy of the original memorandum may be clipped, mounted, and placed in appropriate Bureau case or subject matter files.

70 FEB 1 1966

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5010-106

UNITED STATES GOVERNMENT

Memorandum

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Tele. Room
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Gandy

TO : Mr. W. C. Sullivan

DATE: November 18, 1965

FROM : F. J. Baumgardner

1 - Mr. Belmont
1 - Mr. Mohr
1 - Mr. DeLoach
1 - Mr. H. L. Edwards
1 - Mr. Sullivan
1 - Mr. Baumgardner
1 - Mr. Reddy

SUBJECT: MISSISSIPPI RESOLUTION CALLING FOR CONSTITUTIONAL AMENDMENT TO OUTLAW COMMUNIST PARTY, USA, AND RELATED ACTIVITIES

In a memorandum dated November 1, 1965, from H. L. Edwards to Mr. Felt it was recommended that the Domestic Intelligence Division submit comments regarding a resolution adopted in June 1965 by the State of Mississippi. This resolution called for a constitutional amendment which would empower Congress (1) to dissolve, outlaw or control the activities of the Communist Party, USA, or other totalitarian organizations which advocate violent overthrow of the United States Government; (2) to prevent the dissemination in the United States by communist governments, or governments with which the United States does not have diplomatic relations, of propaganda detrimental to the national security or contrary to the national interests; and (3) to provide for the summary expulsion from the United States of any agent or representative of any such foreign government who is not a citizen and who is engaged in the dissemination of such propaganda.

Mr. Edwards' memorandum notes that John C. Satterfield, Past President of the American Bar Association, has requested the Association's Standing Committee on Education Against Communism to furnish him the Committee's reaction to the above resolution. Each member of the Committee, including the Bureau's representative, was furnished a copy of the resolution by Morris I. Leibman, the Committee Chairman, and was asked to submit any pertinent comments. The resolution will undoubtedly come up for discussion at the next meeting of the Standing Committee on Education Against Communism prior to February 1966.

REC-35 91-1-367-2008

EX-10

G JAN 24 1966

OBSERVATIONS:

The need for this constitutional amendment is based upon the claim that various decisions of the United States

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JAN 24 1966

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Supreme Court have circumscribed, limited or invalidated legislation through which the Congress has sought to control the threat of the Communist Party, USA, and other similar subversive organizations. It would appear that the immediate answer to the problem created by the various Supreme Court decisions does not lie in a constitutional amendment. The approval of two-thirds of the members of both houses of Congress must be obtained to propose an amendment to the Constitution and the proposed amendment must then be ratified by the legislatures of three-fourths of the individual states or by conventions in three-fourths of the states. It has taken from an average one to four years from the date on which the amendment was proposed by Congress for the necessary number of states to ratify the proposed amendment.

Rather than considering at this time a constitutional amendment, it would appear that the American Bar Association's Standing Committee on Education Against Communism might consider recommending that it, or another appropriate committee of the Association, either draw up or offer assistance in drawing up legislation aimed at plugging the gaps in our security laws and then have the powerful American Bar Association push for the enactment of such legislation.

It is noted that following the November 15, 1965, decision of the Supreme Court which rendered unenforcible the Communist Party Membership Registration Section of the Internal Security Act of 1950, Senator James O. Eastland, Chairman of the Senate Committee on the Judiciary, advised the press that he will propose that his committee make it a major project to focus the best legal minds of this country on the problem of how to deal with subversion and to distill the product of these minds into specific legislative proposals for consideration by the Senate. Senator Eastland added that if progressive changes in constitutional interpretation by the Supreme Court have made it impossible to plug the gaps in our security laws, then it will be the duty of the Judiciary Committee to recommend an appropriate constitutional amendment. It appears that Senator Eastland's proposal represents the logical approach to this problem and that initially an all out effort should be made to enact effective legislation to deal

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with subversion. Only when it is determined that effective legislation cannot be enacted should consideration be given to proposing an appropriate constitutional amendment.

When Senator Eastland stated that the Judiciary Committee should focus the best legal minds of this country on the problem of how to deal with subversion and to distill the product of these minds into specific legislative proposals, he certainly could have had in mind seeking assistance from the American Bar Association, which association numbers among its members "the best legal minds of this country."

RECOMMENDATION:

That this memorandum be routed to Mr. H. L. Edwards for his consideration and possible use at the forthcoming meeting of the Standing Committee on Education Against Communism.

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5010-106

UNITED STATES GOVERNMENT

Memorandum

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Holmes
Gandy

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TO : MR. FELT

DATE: January 18, 1966

FROM : H. L. EDWARDS

SUBJECT: AMERICAN BAR ASSOCIATION MIDYEAR MEETING
CHICAGO, ILLINOIS, FEBRUARY 19-22, 1966

Approval has been given previously for me to attend the midyear meeting of the American Bar Association which begins on Saturday, February 19. As in the past in order to cover all the business sessions and to participate in those which are essential, it will be necessary for an alternate and myself to attend this meeting. Special Agent Supervisor [redacted] has been approved in the past to assist me in covering the annual and midyear meetings of the American Bar Association, especially with regard to Standing Committee on Education Against Communism. Assistant Director W. C. Sullivan agrees to making Mr. [redacted] available to assist in covering this year's meeting inasmuch as Mr. [redacted] is assigned to the Domestic Intelligence Division.

With regard to my attendance, a problem has arisen which makes it necessary that I request permission to postpone my reporting to Chicago until Sunday, February 20. The reason I am requesting the delay for one day is because the wedding of my daughter has been scheduled for Saturday, February 19. The date had been set previously for June, 1966, but had to be changed since my daughter's husband-to-be has received notice that he is being sent to Germany following completion of officers' training with the Army. With regard to the coverage of the activities on Saturday which essentially will be the meeting of the Standing Committee on Education Against Communism, Mr. [redacted] is my approved alternate for this committee, is fully aware of its activities and is authorized by Chairman Morris I. Leibman to represent the Bureau at the committee's sessions. It is noted that only members of the committee or their previously approved alternates are authorized to attend. Immediately following the wedding I will depart for Chicago and be available for covering the remainder of the midyear meeting with Mr. [redacted]

94-1-369-2099

REC- 15

RECOMMENDATIONS

1. That approval be given for Mr. [redacted] to assist in the coverage of the midyear meeting.

16 JAN 28 1966

1 - Mr. W. C. Sullivan
1 - Mr. DeLoach
39 FEB 9 1966
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2. That I be allowed delaying my departure as indicated above.

Standing Committee on Education Against Communism

AMERICAN BAR ASSOCIATION

1155 East 60th, Chicago, Illinois 60637 Telephone (312) 493-0533

Mr. Tolson
Mr. DeLoach
Mr. Mohr
Mr. Casper
Mr. Callahan
Mr. Conrad
Mr. Felt
Mr. Gale
Mr. Rosen
Mr. Sullivan
Mr. Tavel
Mr. Trotter
Mr. Wick
Tele. Room
Miss Holmes
Miss Gandy

January 10, 1966

Honorable J. Edgar Hoover
Director
Federal Bureau of Investigation
Washington, D. C.

Dear Mr. Hoover:

In these days when so much attention is being focused on the Klan in the United States and the many acts of violence in which klansmen have been involved, I am reminded of your article which appeared in the "Harvard Business Review", January-February 1964 issue, entitled "The U.S. Businessman Faces the Soviet Spy". This article was most effective in alerting its readers to the problem.

In order to fight the Klan menace, may I suggest that a similar article be prepared by you citing the dangerous nature of the Klan. I will make every effort to have such an article printed in the American Bar Association Journal, which receives widespread circulation. I will also arrange to have reprints made of the article, which will be given additional distribution.

If you could squeeze into your very busy schedule the preparation of one of your authoritative articles on this topic, it would be timely and would be a great public service in alerting Americans to this menace. You may be sure I will do my part in seeing that it is published.

94-L-369-2010

REC- 79

16 FEB 10 1966

ST-107

Sincerely,

Morris I. Leibman

MIL:m

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

Memorandum

Tolson
DeLoach
Mohr
Casper
Callahan
Conrad
Felt
Gale
Rosen
Sullivan
Tavel
Trotter
Wick
Tele. Room
Holmes
Gandy

TO : Mr. Wick

DATE: 1/18/66

FROM : M. A. Jones

SUBJECT: MORRIS I. LEIBMAN
SUGGESTION CONCERNING ARTICLE
ON KU KLUX KLAN

Morris I. Leibman, Chicago attorney and good friend of the Bureau, has written suggesting the Director prepare an article for the American Bar Association (ABA) regarding the dangerous nature of the Ku Klux Klan. Leibman is Chairman of the Standing Committee on Education Against Communism, ABA. While Leibman indicates he does not have a definite commitment as yet from the "ABA Journal," he will make every effort to have it carry the article and will arrange for its later reprinting and distribution upon publication.

The January, 1966, issue of "The Reader's Digest" contains John Barron's article, "The FBI's Secret War Against the Ku Klux Klan." We worked very closely with Barron and "The Reader's Digest" on this article which exposes the treacherous nature of the Klan to the millions of readers of "The Reader's Digest." The "ABA Journal" is, of course, a prestige publication of the highest order and for it to carry the Director's byline on an article on the Klan would add greatly to exposing the seriousness of the Klan's operations in this country.

Assistant Director Sullivan is strongly in favor of such an article and feels there is considerable additional information in Bureau files for the Bureau to prepare an article which will be substantially different from the one carried by "The Reader's Digest" in its January, 1966, issue.

House Committee hearings are presently being conducted on Klan activities and news accounts of its hearings are receiving wide circulation in the press. However, these hearings, to a large extent, have given an unclear picture of true Klan activities and there have been many unfounded charges and accusations by both sides which is undoubtedly confusing to the public. Hence, an article released in the Director's name will do much to clear the air and put the Klan in its proper perspective.

RECOMMENDATION:

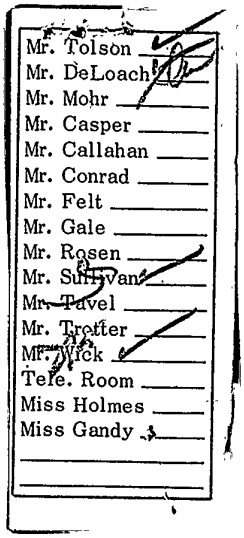
That the attached letter to Leibman be sent indicating the Director would be glad to prepare a byline article on the Klan for the "ABA Journal."

Enclosure

1 - Mr. DeLoach - Enclosure
1 - Mr. Sullivan - Enclosure
1 - Mr. Wick - Enclosure
1 - Mr. Rosen - Enclosure

JMM:cms/mjl (7)

CORRESPONDENCE


Mr. Tolson
Mr. DeLoach
Mr. Mohr
Mr. Casper
Mr. Callahan
Mr. Conrad
Mr. Felt
Mr. Gale
Mr. Rosen
Mr. Sullivan
Mr. Tavel
Mr. Trotter
Mr. Wick
Tele. Room
Miss Holmes
Miss Gandy

Leibman, Williams, Bennett, Baird and Minow

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MARK J. LEVICK
MATA P. HILGESON

January 24, 1966

Honorable J. Edgar Hoover
Director
Federal Bureau of Investigation
United States Department of Justice
Washington, D. C.

Dear Mr. Hoover:

Thank you so much for your letter of January 18th.

It is most generous of you to take the time to write an article exposing the true nature of the Ku Klux Klan. I shall look forward to receiving it.

I had not seen the article in the January Reader's Digest and appreciate your thoughtfulness in providing me with a copy. I am circulating copies of same to our Committee members and other interested persons.

With kindest regards.

Sincerely,

MIL:m

Morris I. Leibman

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TO : Mr. Felt

DATE: February 4, 1966

FROM : H. L. Edwards

SUBJECT: AMERICAN BAR ASSOCIATION MIDYEAR MEETING
CHICAGO, ILLINOIS; FEBRUARY 16 - 22, 1966
STANDING COMMITTEE ON JURISPRUDENCE AND LAW REFORM

Enclosed is a copy of a report which the above-captioned committee will consider at the Midyear Meeting of the American Bar Association, February 16 - 22, 1966. Specifically, the report deals with legislation to restrain the abuse of writs of habeas corpus in federal courts by state prisoners, recommends inclusion of certain amendments to the habeas corpus bill proposed by the Judicial Conference of the United States, and approves and endorses in principle H.R. 7641, 89th Congress, First Session, to provide that chief judges of circuit courts and chief judges of district courts shall cease to serve as such upon reaching the age of sixty-five.

In view of the subject matter of the above report, it is believed that it should be reviewed for observations and/or criticisms insofar as the Bureau's interests are concerned by the Legal Research Desk of the Training Division. Since this report will be considered at the Midyear Meeting, the results of the review should be furnished to the Inspection Division by February 14 in order that consideration can be given to the best method of handling any potential problems.

RECOMMENDATION:

That this matter be referred to the Legal Research Desk, Training Division, for appropriate review and analysis.

Enclosure

1 - Mr. Casper (Attention: Mr. D. J. Dalbey with enclosure)

HLE:mbk
(4)

CAUTIONARY NOTE

Only the RESOLUTION(S) presented herein, when approved by the House of Delegates, become official policy of the American Bar Association. These are listed under the heading RECOMMENDATION(S). Comments and supporting data listed under the sub-heading REPORT are not approved by the House in its voting and represent only the views of the Section or Committee submitting them. Reports containing NO recommendations (resolutions) for specific action by the House are merely informative and likewise represent only the views of the Section or Committee.

AMERICAN BAR ASSOCIATION

Standing Committee on
Jurisprudence and Law Reform

RECOMMENDATIONS

I. Resolved, That the American Bar Association approves and endorses in principle the recommendation of the Judicial Conference of the United States in September 1965 for the enactment by Congress of legislation to restrain the abuse of writs of habeas corpus in federal courts by state prisoners.

II. Resolved, That the American Bar Association recommends the inclusion of certain amendments, described in the report accompanying this resolution, to the habeas corpus bill proposed by the Judicial Conference of the United States.

III. Resolved, That the American Bar Association approves and endorses in principle HR 7641, 89th Congress, 1st Session, to provide that chief judges of circuit courts and chief judges of district courts shall cease to serve as such upon reaching the age of sixty-six.

REPORT

I

LIMITATION ON ABUSE OF HABEAS CORPUS

Our Committee, beginning in 1958, has recommended the endorsement by the Association of legislation designed to restrain abuse of writs of habeas corpus in federal courts by state prisoners. We have renewed the recommendation in each of the last three reports to the House of Delegates.

Our 1958 proposal was approved by the Board of Governors and by the House of Delegates. 83 ABA Rep. 189-90, 275, 366-7 (1958). This recommended endorsement of S-1011 and HR 8361, 85th Congress, 2d Session, identical bills which had been drafted by the Committee headed by the late Judge John J. Parker and approved by the Judicial Conference of the United States. These bills were more stringent than those subsequently considered.

Action on the last three proposals has been deferred to allow time for further consideration by the Section of Criminal Law, the Section of Judicial Administration, and the Committee on Minimum Standards for the Administration of Criminal Justice. When the House of Delegates met in August 1965 the matter was under reconsideration by the Judicial Con-

ference of the United States. In the following month the Judicial Conference completed its restudy and recommended the adoption of a revised bill, a draft of which is annexed to this report, as part of the report of its Committee on Habeas Corpus headed by Judge Orie L. Phillips.

The Standing Committee on Jurisprudence and Law Reform has reviewed the revised draft, and while we do not believe that the bill goes far enough to provide an entirely adequate remedy for the long-continued and growing abuse of the writ of habeas corpus in federal courts by state prisoners we are convinced that it will aid in bringing about an improvement in the present situation. We accordingly recommend that it be approved and endorsed in principle. We further recommend that the Association go on record in favor of two strengthening amendments which are described later in this report.

REASONS FOR THE LEGISLATION

The need for changes in the Federal Judicial Code governing procedure in habeas corpus cases springs from a number of causes. Prominent among them are, first, the burden imposed on federal courts by a flood of habeas corpus proceedings brought by persons in custody under judgments of

state courts; second, the long delay in execution of state court judgments in criminal cases produced by repeated habeas corpus proceedings in federal courts; and third, the unsuitability of the recently expanded writ of habeas corpus for use in the modern system of criminal law enforcement.

BURDEN OF HABEAS CORPUS ON FEDERAL COURTS

Habeas corpus cases continue to impose a constantly mounting burden on the federal judiciary. The major part of the increase has consisted of applications filed by state prisoners seeking relief under the Constitution and laws of the United States. Each fiscal year in recent times has shown a filing heavier than the year before. In 1941 the applications numbered 127. By 1961 the total had reached 984. In ensuing years an even greater upward trend appeared. The number rose to 1,115 in 1962, to 1,903 in 1963, to 3,531 in 1964, and to 4,664 in 1965. Each successive year's figure represented an all-time high.

While a small proportion of these applications are well founded, the overwhelming majority of them are lacking in merit. Many are frivolous or repetitious or both. Brown v. Allen, 344 US 443 (1953), (separate majority opinion of Frankfurter, J., pp 497-9, 514-32; concurring opinion of

Jackson, J., pp 536-40), Fay v. Noia, 372 US 391, (1963), (Clark, J., dissenting, pp 445-48); Parker, Limiting the Abuse of Habeas Corpus, 8 FRD 171 (1948); Report of the Committee on Habeas Corpus (Judge Orie L. Phillips, Chairman), 33 FRD 367 (1963); Pope: Habeas Corpus and Post-Conviction, Suggestions for Lessening the Burden of Frivolous Applications, 33 FRD 409, 410-411.

In the twelve year period from 1946 to 1957 the applicants were successful in 1.4% of their cases, HR Rep. No. 548, 86th Congress, 1st Session, p. 37. A survey made in 1952 showed that in all federal court applications for habeas corpus filed in the previous years sixty-seven out of 3,702 were granted. Only a small portion of these sixty-seven applications resulted in release from custody. In the preceding four years, out of twenty-nine applications granted only five prisoners were released from the penitentiary. Habeas Corpus Cases in the Federal Courts Brought by State Prisoners, Administrative Office of the United States Courts, p. 4 (December 16, 1952) cited in the separate opinion of Mr. Justice Frankfurter in Brown v. Allen, 344 US 443 (1953). In later years, with changing judicial interpretations of the

extent to which state criminal procedure is governed by the Fourteenth Amendment and the Bill of Rights, the proportion of successful applications has increased. The percentage amounted to 2.25 in 1963 and 3.84 in 1964 - still very low figures in view of changes in the applicable rules. It may be doubted in the light of past experience whether a substantial proportion of the successful applicants were finally released from custody.

HABEAS CORPUS AND DELAY IN CRIMINAL PROCEEDINGS

The frequent resort to federal habeas corpus by state prisoners is a serious factor in the delay encountered in the administration of criminal justice in this country.

In our last three reports we have cited concrete cases where long drawn-out habeas corpus proceedings in the federal courts contributed to the slowness of the criminal procedure, although it did not account for all of the delay.

In the Chessman case in California, twelve years elapsed between the conviction and the execution of a man who had been found guilty of seventeen felonies, two of them carrying the death penalty. Chessman v. Teets, 239 F 2d 205 (9th Cir., 1956). Note: The Caryl Chessman Case: A Legal Analysis, 44 Minn. L. Rev. 941 (1960).

In the Townsend case in Illinois, ten years have elapsed since the conviction in state court of the defendant for murder and the proceeding is still unresolved. The conviction was affirmed by the State Supreme Court. People v. Townsend, 11 Ill. 2d 30 (1957), 141 N.E. 2d 729 (1957), cert. denied, 355 US 850 (1957). More than seven years have already been consumed in habeas proceedings in the federal courts notwithstanding the availability of a motion for post-conviction relief in Illinois and the employment of that procedure by the prisoner. The case has been in the Supreme Court of the United States on certiorari five times - once to review the original conviction, 355 US 850 (1957), once to review denial of the motion for post-conviction relief, Townsend v. Illinois, 358 US 887 (1958), and three times in the habeas proceedings, Townsend v. Sain, 359 US 64 (1959), Townsend v. Sain, 372 US 293 (1963), and Townsend v. Ogilvie, 379 US 984 (1965).

In the Labat and Poret case in Louisiana twelve years have already elapsed since the conviction and sentence to death of the defendants in 1953. Habeas corpus proceedings commenced in federal courts in 1957 and are still in progress after approximately eight years. State v. Labat, La. 201, 75 So. 2d 333 (1954); cert. granted 348 US 950 (1955),

judgment affirmed, sub. nom. Michel v. Louisiana, 350 US 91 (1955), rehearing denied, sub. nom. Poret et al v. Louisiana, 350 US 955 (1956); writ of habeas corpus denied, Labat v. Sigler, 162 F. Sup. 574 (1958), affirmed Labat v. Sigler, 267 F 2d 307 (1959), cert. granted, judgment vacated and case remanded to the district court, US ex rel. Poret et al v. Sigler, 361 US 375 (1960); habeas corpus denied by district court in unreported decision, US ex rel. Poret and Labat v. Sigler, (October 8, 1964). The case is now pending in Court of Appeals for the Fifth Circuit.

Not all habeas corpus proceedings have taken as long as in Chessman, Townsend and Labat, but the delays are too often substantial enough to cast a reflection in the eyes of many people on the administration of justice. Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on HR 5649, 84th Congress, 1st Sess., Ser. 6, 45-51. Brown v. Allen, 344 US 443, 537-8 (1953)(Jackson, J., concurring).

PRESENT PROCEDURE LENDS ITSELF TO ABUSE

The present habeas corpus procedure in federal courts constitutes an invitation to abuse by state prisoners.

The present-day writ is materially different from the writ at common law or from what it is in the states or from what it long was in federal courts. Parker, Limiting the Abuse of Habeas Corpus, 8 FRD 171 (1948); Fay v. Noia, 372 US 391 (1963). At common law habeas corpus was used largely,

although not exclusively, as a remedy for executive detention, including imprisonment without charge or without trial or to inquire into the jurisdiction of the committing court. Its administration was devoid of the complications arising from the nature of the federal system which have beset its use in the United States.

Up to 1867 the federal courts were without habeas corpus jurisdiction except in cases of prisoners detained under the laws of the United States. Their jurisdiction did not extend to state prisoners.

By the Habeas Corpus Act of 1867 the federal courts were given authority "to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States;" Act of February 5, 1867, Ch. 28, §1, 14 Stat. 385.

For many years proceedings under this Act were largely confined to cases where a prisoner was detained by judgment of a court without jurisdiction or proceeding under an unconstitutional statute, In re Wood, 140 US 278 (1891), or where the detention was regarded as based on some illegality in the sentence imposed as distinguished from the judgment of

conviction. Bator, Finality in Criminal Law, 76 Harv. L. Rev. 441, 474-483 (1963). "It was not until this century that the Fourteenth Amendment was deemed to apply some of the safeguards of criminal procedure contained in the Bill of Rights to the states. *** More recently, further applications of the Fourteenth Amendment in state criminal proceedings have led the Court to find correspondingly more numerous occasions upon which federal habeas would lie." Fay v. Noia, 372 US 391, 410 (1963).

In this process the present federal writ of habeas corpus in its application to state prisoners has been expanded to a point unknown to the common law or to the previous practice in the United States. It is this expansion that has produced the flood of habeas corpus cases that burden the federal courts and contribute greatly to the unfortunate delays in the final disposition of proceedings for the enforcement of criminal law in the states. 1/

1/ The expansion was accompanied by warnings from some of the members of the Court that the consequences would be a flood of new applications that would engulf the federal courts. Mr. Justice Clark was among those who accurately forecast what has taken place. In his dissenting opinion in Fay v. Noia, 372 US 391, 445-6 (1963), he said: "First, there can be no question but that a rash of new applications from state prisoners will pour into the federal courts, and 98%

These further applicati ons bring about additional rules of criminal procedure required for the first time to be observed by state law enforcement agencies or state courts. They afford an opportunity and in numerous instances an invitation for persons convicted under the old rules and now

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1/ cont.
of them will be frivolous, if history is any guide.*** In fact, the courts are already swamped with applications which cannot, because of sheer numbers, be given more than cursory attention." At 445-6.

He referred to the Parker Bill which had been supported by the Judicial Conference of the United States, the Conference of Chief Justices and the National Association of Attorneys General. "While I have heretofore opposed such legislation, I must now admit that it may be the only alternative in restoring the writ of habeas corpus to its proper place in the judicial system. That place is one of great importance - a remedy against illegal restraint - but it is not a substitute for or an alternative to appeal, nor is it a burial ground for valid state procedures." At 448. Mr. Justice Clark now apparently considers the trouble to come from the lack of a modern post-conviction relief statute in the majority of the states. Case v. Nebraska, 381 US 336, 339 (1965) (Concurring opinion).

Mr. Justice Jackson issued similar warnings about the probable consequences of expansion of the writ in his dissenting opinion in Price v. Johnston, 334 US 266, 301 (1948), and in his concurring opinion in Brown v. Allen, 344 US 443, 532, 536-8 (1953).

in custody to seek release by habeas corpus or other post-conviction procedure. A few examples may be noted. Mapp v. Ohio, 367 US 643 (1961), reversing Wolf v. Colorado, 338 US 25 (1949), holds that under the Fourth Amendment evidence obtained in an unreasonable search and seizure must be excluded in a state criminal trial. Malloy v. Hogan, 378 US 1 (1964) reversing Twining v. State of New Jersey, 211 US 78 (1908) and Adamson v. California, 332 US 46 (1947), rules that the Fifth Amendment's exception from self incrimination is also protected by the Fourteenth Amendment against abridgment by the states. Gideon v. Wainwright, 372 US 335 (1963) overruling Betts v. Brady, 316 US 455 (1942), holds that in a state prosecution for a non-capital offense provision of counsel to an indigent is a fundamental right. Griffin v. Illinois, 351 US 212 (1956), holds that a person convicted in a state court of a non-capital felony must be provided with a free transcript of proceedings where essential to appeal. In Escobedo v. Illinois, 378 US 478 (1964), the Court ruled that when a suspect has requested and been denied an opportunity to consult with his lawyer, no statement elicited by the police during interrogation before indictment may be used against him in a state criminal trial. Whether the rules laid down in these cases apply prospectively or retrospectively is a question of much practical importance for upon its resolution turns the right to a new trial or perhaps the right to liberty of many persons now in prison. It has been held that the rule applies prospectively in connection

with evidence obtained by unlawful search and seizure. Linkletter v. Walker, 381 US 618 (1965). The question is still unsettled in other situations. It is before the Supreme Court in a number of pending cases. 34 L.W. 3191, 3192. Mishkin, The Supreme Court-Foreword, 79 Harv. L. Rev. 56 (1965).

In a typical case, a man is convicted of murder in a state court trial, appeals to the highest court in the state where the judgment is affirmed, and then files a petition for a writ of certiorari in the Supreme Court of the United States, setting up an alleged violation of his constitutional rights in the state proceedings. When certiorari is denied, the convicted man then files an application for habeas corpus in a federal district court which is required to consider anew his contentions of violation of his federal rights since the previous judgments are no bar in a habeas corpus proceeding. If the writ is denied in the federal district court, he may take his case to the court of appeals. If the decision there is against him, he may file a petition for a writ of certiorari in the Supreme Court of the United States. If a hearing is denied there, he is at liberty to file in the federal district court a new application - or successive applications - for habeas corpus, perhaps alleging violations of some constitutional right not mentioned in the prior proceedings, and the same procedure is repeated. If a reversal occurs anywhere along the line the result serves to complicate and lengthen the proceedings.

In these proceedings the writ of habeas corpus provides the state prisoner with two things: first, an opportunity for a retrial of the facts bearing on the federal question, which in some instances amounts almost to a complete retrial and, second, with what is in effect a second system of appeals.

The prisoner may secure a retrial of the facts where he claims a violation of some right under the Constitution or laws of the United States and succeeds in convincing a federal court that his petition presents a substantial question. The district court not only has the power but in some situations is under a mandatory duty to try anew the contested factual issues upon which the federal claim is based. "It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues *** [W]here an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew." Townsend v. Sain, 372 US 293, 312 (1963). In that case the court went on to say:

> "***We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." Id. at 313.

In some instances this rule forces retrial in the district court of practically the whole case previously determined in the state proceeding. "While, as appears from the judgment and opinion of the district judge, the application for relief in this case did not obtain its purpose, a new trial in the state court, it did obtain for the applicants a full hearing in the federal court 'including the testimony of twenty-four witnesses and the introduction of several documents '. In this hearing, as stated in his opinion, the district judge 'in effect, retried the petitioners for the offense of which they have been convicted". Labat v. Sigler, 267 F 2d 307 (1959).

According to statistics compiled by the Administrative Office of the United States Courts hearings were held in about 11% of habeas cases disposed of in federal courts in the fiscal year of 1965.

The principle of res judicata does not apply in the habeas corpus proceedings and the prisoner may present

successive applications based upon the same or different grounds to the same judge or to a different judge. This was the rule at common law and this is the federal rule today in the United States. "At common law, the denial by a court or judge of an application for habeas corpus was not res judicata***' A person detained in custody might thus proceed from court to court until he obtained his liberty***' Indeed, only the other day we remarked upon the familiar principle that res judicata is inapplicable in habeas proceedings." Sanders v. United States, 373 US 1, 7-8 (1963). See also Darr v. Burford, 339 US 200, 214-5 (1950).

This right of the prisoner to make repeated applications for a writ of habeas corpus which must be entertained by the federal court in which they are filed is no mere theoretical right never exercised in actual practice. It is one that is actually employed to the extent of imposing severe burdens on the judiciary. The extent of the exercise of the right in one jurisdiction was recounted by the Court of Appeals of the District of Columbia (Justin Miller, J.) in Dorsey v. Gill, 148 F 2d 857, 862 (1945):

> "The most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third 24, a fourth 22, a fifth 20. One hundred nineteen persons have presented 597 petitions - an

average of 5."

In the district court in San Francisco from June 1937 to June 1947, six prisoners in Alcatraz filed a total of sixty-eight petitions while fifty-seven others filed one hundred eighty-three petitions. One inmate filed sixteen successive petitions, another filed fifteen, and still another filed fourteen. Use and Abuse of the Writ of Habeas Corpus, Judge Louis E. Goodman, 7 FRD 313, 315 (1947). In Price v. Johnston, 334 US 266 (1948), the court reversed the lower federal courts which had denied a hearing on the fourth successive application of a prisoner for a writ of habeas corpus. Just the other day Barney P. Bennett, an inmate of an Illinois penitentiary, submitted to the federal district court in Chicago his tenth application for habeas corpus. (Case No. 65C 2054, USDCND Ill). Six of the preceding applications had been filed in state courts, four in federal courts.

POSSIBLE REMEDIES FOR ABUSE OF HABEAS CORPUS

There is wide agreement on the need for a more expeditious procedure for review in the federal courts of claimed violation of rights arising under the Constitution and laws of the United States.

Most people agree that some remedy must be found for the existing abuses in habeas corpus procedure. The difference of opinion relates mostly to the nature of the

appropriate corrective measures.

The Parker Committee proposed to attain greater expedition by requiring prisoners to exhaust all remedies open to them in the state courts, including collateral remedies such as habeas corpus and the motion for post-conviction relief, with review in the federal courts limited to certiorari in the Supreme Court of the United States. This proposal was at one time endorsed by the Judicial Conference of the United States and by this Association. It was incorporated in bills passed by the House of Representatives but never meeting acceptance in the Senate. The endorsement of the Judicial Conference was afterwards withdrawn chiefly on the ground that the resulting petitions for certiorari would overburden the Supreme Court.

The Judicial Conference, following a recommendation by the Phillips Committee, subsequently proposed a bill designed to afford (1) expedition of cases by providing for hearings before a panel of three judges in the federal district court; and (2) a degree of finality for judgments. Report of Committee on Habeas Corpus, 33 FRD 367 (1963). The Judicial Conference has now withdrawn its proposal for a three judge court. Its present bill calls for a remedy in the form of a degree of finality for judgments in these cases. Report of the Proceedings of the Judicial Conference of the United States, September 22-23, 1965.

In England it has been recognized that under modern criminal procedure, with the right of appellate review, the reasons supporting the wide latitude afforded by the writ of habeas corpus in former times no longer have the same force and are not essential today for the preservation of the liberty of the individual. Parliament a few years ago passed a statute requiring that where one application has been made for habeas corpus, no second application shall again be made by the same person on the same grounds whether to the same court or judge or to any court or judge unless fresh evidence is introduced in support of the application. Administration of Justice Act, 1960, 8 & 9, Eliz. 2, c. 65, §14(2). This legislation introduces a greater degree of finality in habeas corpus proceedings than the bill now proposed by the Judicial Conference of the United States.

Habeas corpus grew up in federal courts when there were no appeals from convictions in criminal cases 2/ and yet it was well established that the right did not cover

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2/ "[N]o appeals from convictions in the federal courts were afforded (with roundabout exceptions negligible for present purposes) for nearly a hundred years; and, despite the civilized standards of criminal justice in modern England, there was no appeal from convictions (again with exceptions not now pertinent) until 1907. Thus it is now settled that due process of law does not require a State to afford review of criminal judgments." Frankfurter, J., concurring in Griffin v. Illinois, 351 US 12, 21 (1956).

the same ground as judicial review and was not to be a substitute for appeal. Following adoption of the Fourteenth Amendment, the federal government, through the passage of the Habeas Corpus Act of 1867 and through decisions of the Supreme Court in the past thirty-five years, has in effect decided to exercise close supervision over the administration of the criminal laws of the several states. This exercise of federal power and authority necessarily carries with it a corresponding responsibility and duty to exercise the supervision in a workable, efficient and expeditious manner, as well as to avoid anything that would hinder, embarrass or delay the proper administration of justice or defeat efforts to maintain law and order.

Up to now the federal government has not met its responsibilities in this area. It has not acted to correct the dislocations which have been occasioned by its extensive intervention in the enforcement of the criminal laws of the states. The present bill recommended by the Judicial Conference is a step in the right direction. Experience will tell whether it is sufficient for the purpose.

POST-CONVICTION RELIEF MOTION ONLY A PARTIAL REMEDY

One of the remedies suggested for the present abuse of the writ of habeas corpus is the motion for post-conviction relief in the nature of the writ of coram nobis. The motion is addressed to the court which imposed the sentence. While

in some jurisdictions it may be made at any time in others it must be made within a specified period - twenty years under the present statute in Illinois. It commonly contains a clause providing for a measure of finality for the judgment on the motion, although not all of these attempts at finality have survived judicial interpretation. The motion is in most instances designed to take the place of habeas corpus.

One of the outgrowths of the study of habeas corpus in federal courts by the Parker Committee of 1942, appointed by the Judicial Conference of the United States, was a proposal to establish a post-conviction relief procedure in federal district courts. This recommendation was approved by the Judicial Conference and adopted by Congress in 1948. It is now a part of the Judicial Code, 28 USC 2255. It applies, however, only to federal prisoners.

There has been a similar movement to secure the inauguration of post-conviction motion procedure in the several states. It has been put in effect in a number of jurisdictions by statute, by rule of court, or by judicial decision. Case v. Nebraska, 381 US 336, 338 (1965). The Commissioners on Uniform State Laws have drafted a Model Act, which has been adopted in some states which have legis-

lated on the subject, and a revised version was endorsed by this Association at the annual meeting in Miami in August 1965.

In the area where it applies, post-conviction motion procedure represents an improvement over the writ of habeas corpus. The Model Act and apparently other state statutes introduce a measure of finality which is lacking in habeas corpus where the principle of res judicata is not observed, although the federal statute has been construed to provide a severely attenuated finality. Sanders v. United States, 373 US 1 (1963). The procedure tends to eliminate the privilege inherent in the writ of habeas corpus of going from judge to judge in the hope of finding one who will grant the writ. It requires that the motion be heard by the court which passed the sentence. These and other advantages give a promise of effectiveness, but not, save to a limited extent, in the area where the present abuses are greatest - the application for a writ of habeas corpus in a federal court by a state prisoner. A judgment disposing of a motion for post-conviction relief, even though affirmed by the highest court of the state with certiorari denied by the Supreme Court of the United States, and even though enjoying a measure of finality within the state judicial system, enjoys no finality in a federal court

in which the prisoner may still file an application, or even successive applications, for a writ of habeas corpus to test the legality of his detention. The motion for post-conviction relief is a collateral remedy and as such it is not necessary for a state prisoner to resort to it as a condition precedent to the filing of a petition for a writ of habeas corpus in a federal court. Brown v. Allen, 344 US 443, 447-50 (1954).

The motion for post-conviction relief gives the state judicial system a further opportunity of sifting out meritorious cases by granting relief where some federal right has been unlawfully denied. As previously observed, however, the meritorious cases are relatively few. Some of those whose motion for post-conviction review are denied in the state courts may abide by the decision and desist from taking their cases further. Others may not, and it may be doubted whether an adverse decision at this stage would deter any very large proportion of the class of prisoners who now seek federal habeas corpus. These persons are inclined to insist on exhausting every available remedy particularly where further proceedings serve to delay carrying out the sentence, and the present law governing federal habeas corpus offers them a welcome and often fruitful opportunity.

The written record made in the state post-conviction review may be of some help where the prisnner goes on to apply for federal habeas corpus. It may be doubted, however, whether in most cases it would add much of value to the record made in previous stages of the state proceedings.

Experience to date does not indicate that the post-conviction motion would solve the problem presented by the state prisoner seeking relief in federal court. The post-conviction procedure is in effect in fifteen states, in seven by statute, in six by rule of court and in two by judicial decision. Case v. Nebraska, 381 US 336, 346(1965). In two of these states, New York and Nebraska, the new procedure was established in 1965 and the results are not yet reflected in available statistics. In a third, Alaska, where it was placed in effect by rule of court in 1961, statistics are not available for the previous period.

This leaves twelve states where comparisons are possible. The statistics set forth in the Annual Report of the Administrative Office of the United States Courts show that in nine of these applications for habeas corpus in federal courts have increased since the new procedure was established. Those states are Delaware, Florida, Kentucky, Maryland, Missouri, New Jersey, North Carolina, Oregon and West Virginia. In the three remaining states improvement in the situation is reflected

in the statistics following the inauguration of the new procedure. In Wyoming the number of applications was not large either before or after the change in procedure. There were four in 1961 and four in 1960, the year before the post-conviction procedure act was passed, and three in 1965. In Maine the decline was relatively more substantial, although not many applications have been filed in any year. In Illinois there has been a large decline since the statute was passed in 1949 but the decline had already set in at that time. The applications reached a peak of 448 in 1944, declined to 77 in 1951, rose to 151 in 1953, fell to a low of fifty-two in 1960, and then fluctuated, rising to 207 in 1964 and dropping to 175 in 1965.

The results in Illinois have been affected by complicating factors, including principally a rule under which prisoners in the state penitentiary were formally denied the right to resort to the courts except through counsel. This rule was attacked in proceedings begun in the fiscal year of 1943 and condemned as illegal in the succeeding year. United States ex rel. Bongiorno v. Ragen, 54 F. Supp. 973 (DC ND Ill., 1944). This resulted in a temporary flood of habeas proceedings in state and federal courts. 3/ Illinois prisoners, in spite of

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3/ "In Illinois the problem of vindication of the 'new' concepts was complicated by two factors. First, the Warden of the State Penitentiary had promulgated and enforced a rule under which prisoners were denied the right to resort to the courts except through counsel. It should perhaps be said that Illinois was not

availability of statutory post-conviction procedure in the state courts, still resort to the federal courts. In the Townsend case, for example, the prisoner after unsuccessfully resorting to a motion for post-conviction relief in the state court filed successive petitions for habeas corpus in the federal district court which have already consumed more than seven years without a final determination.

The experience with post-conviction procedures in these states taken as a whole, while indicating that it is of some real value, nevertheless suggests that it would be a mistake to rely upon it to afford a complete remedy for the abuse of the writ of habeas corpus in the federal courts. Other remedies are also obviously needed.

"the only state to deprive prisoners of their right to resort to courts. See Ex parte Hawk, 321 US 114, 64 S.Ct. 448(1944); Cochran v. Kansas, 316 US 225, 62 S.Ct. 1068(1942). The rule effectively denied large numbers of indigent Illinois prisoners access to the courts. When at long last the rule was exposed and abrogated in a proceeding in the United States District Court (United States ex rel. Bongiorno v. Ragen, 54 F.Supp. 973, 975 (ND Ill.), aff'd 146 F.2d 349 (CA 7th, 1944), cert. den. 325 US 865, 65 S.Ct. 1194(1945)) the State and Federal courts were literally flooded with habeas corpus proceedings.***As was to be expected, the formal allegations of the petitions and other pleadings filed by the prisoners made sensational charges against courts, judges, law enforcing agencies, prosecutors and counsel". Jenner, The Illinois Post-Conviction Hearing Act, 9 FRD 347.

PROVISIONS OF JUDICIAL CONFERENCE DRAFT BILL

The present proposal of the Judicial Conference for legislation on the subject is addressed to the establishment of the principle of res judicata to a limited degree in order to bring about a measure of finality in habeas corpus proceedings so as to discharge repeated proceedings for the writ by the same person as well as other forms of relitigation of the same issues.

To bring about a greater degree of finality the draft of a bill places three limitations on the right of a state prisoner to file a petition for a writ of habeas corpus in a federal court.

First, it provides that a judgment of the Supreme Court of the United States on prior review of the case shall be conclusive on all issues actually adjudicated by that Court.

Second, it specifies that a subsequent application need not be entertained where the legality of the detention has been determined by a federal court on a prior application.

Third, it provides that a determination on the merits of a factual issue made by a state court and properly evidenced shall be presumed to be correct, and the burden

shall rest on the petitioner to prove that such a determination is erroneous.

There are exceptions to each one of these rules.

To the first rule there is an exception where a material and controlling fact did not appear in the record in the Supreme Court, and where the petitioner could not have caused such fact to appear in the record by the exercise of reasonable diligence.

To the second rule an exception is recognized where there is alleged "a factual or other ground not presented at the hearing on the earlier application for the writ, and then only on a showing of a reasonable excuse for failure to present such factual or other ground on the hearing on the earlier application."

To the third rule eight exceptions are recognized in the draft, so that there is no presumption in favor of state action where it appears:

> "(1) that the merits of the factual dispute were not resolved in the state court hearing;
>
> "(2) that the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing;
>
> "(3) that the material facts were not adequately developed at the state court hearing;

"(4) that the state court lacked jurisdiction of the subject matter or over the person of the applicant in the proceeding before it;

"(5) that the applicant was an indigent and the state court, in deprivation of his constitutional rights, failed to appoint counsel to represent him in the state court proceeding;

"(6) that the applicant did not receive a full, fair and adequate hearing in the state court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the state court proceeding;

"(8) or unless that part of the record of the state court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record."

II

AMENDMENTS PROPOSED BY STANDING COMMITTEE TO BILL

As previously stated, our Committee recommends that the Association go on record as suggesting two principal amendments to the bill proposed by the Judicial Conference.

First, the previous Judicial Conference draft, as well as HR 1835, 88th Congress, and HR 4977, 89th Congress, provided for an amendment to 28 USC 2244 providing that after a hearing in a federal court when application for writ of

habeas corpus has been denied, a subsequent application for the writ "shall not be entertained... except on a factual or other ground not presented at the hearing on the earlier application for the writ and then only on a showing of a reasonable excuse for the failure to present such factual or other ground at the hearing on the earlier application." In the latest draft of the Judicial Conference, the phrase "shall not be entertained" is eliminated from this section and the phrase "need not be entertained" is substituted. It would leave Section 2244 weaker rather than stronger in its provision for finality. We consider the revision unfortunate. It would serve unduly to water down the limited degree of finality attached to the prior judgment of the court. While the alteration involves only the change of a single word, it really goes to the heart of the objective of introducing a reasonable degree of finality into judgments in habeas corpus proceedings. We think the previous version should be retained.

Second, the previous Judicial Conference draft, as well as HR 1835, 88th Congress, after providing for a presumption of correctness in federal habeas corpus proceedings for a determination on the merits of a factual issue previously

made by a state court in a proceeding to which the applicant for the writ was a party, goes on to enumerate some seven exceptions. These exceptions were largely based upon the requirements laid down by the Supreme Court in Townsend v. Sain, 372 US 293, 313 (1963), which are quoted at pages 25 and 26 of this report. To these exceptions the last draft of the Judicial Conference adds another, which is exception No. 8 quoted on page 26 of this report and which makes the presumption inapplicable unless the pertinent part of the record in the state proceeding is produced and the federal court concludes that the record does not fairly support the factual determination of the state court. This exception, it is true, is also derived from Townsend, (372 US 293, 313).

Yet these eight exceptions seem unnecessarily detailed. They are based upon the power of Congress to implement the due process clause of the Fourteenth Amendment and taken together they add up simply to a requirement of due process. It is always possible that new problems or altered versions of old problems may invoke new or different rules and it would seem to be undesirable to put the present ones in statutory form. In HR 5958, 89th Congress, 1st Session, a bill on the same subject otherwise very closely

following the last previous judicial council draft introduced by Representative Smith of Virginia, the exceptions were reduced to two - "(1) that the applicant did not receive a full, adequate, and fair hearing in the state court proceeding; or (2) that the applicant was otherwise denied due process of law in the state court proceeding."

These two exceptions would seem to cover the whole field and for the present, at least, to incorporate the requirements of Townsend. In our view they are preferable and would be sufficient. We recommend that the Association endorse an amendment substituting them for the eight exceptions in the Judicial Conference draft. If this change is made the next succeeding paragraph in the Judicial Conference draft should be changed to conform. As thus changed it would read as follows:

> "And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) and (2), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

III

TERM OF CHIEF JUDGES

We renew our recommendation for the endorsement of legislation to lower the age at which Chief District Judges and Chief Circuit Judges in the Federal system cease to serve in such capacity. This proposal is embodied in HR 7641, which would change only one word in each of three places where it appears in Sections 45(a) and 136(a) of the United States Code, Title 28. With that word struck through and the proposed change reflected in brackets, 28 USC §45(a) would read:

> "The circuit judge in regular active service who is senior in commission and under ~~seventy~~ [sixty-six] years of age shall be the chief judge of the circuit. If all the circuit judges in regular active service are ~~seventy~~ [sixty-six] years of age or older the youngest shall act as chief judge until a judge has been appointed and qualified who is under ~~seventy~~ [sixty-six] years of age, but a judge may not act as chief judge until he has served as a circuit judge for one year."

When similarly treated, 45 USC §136(a) would read:

> "In each district having more than one judge the district judge in regular active service who is senior in commission and under ~~seventy~~ [sixty-six] years of age shall be the chief judge of the district court. If all the district judges in regular active service are ~~seventy~~ [sixty-six] years of age or older the youngest shall act as chief judge until a judge has been appointed and qualified who is under ~~seventy~~ [sixty-six] years of age, but a judge may not act as chief judge until he has served as a district judge for one year."

It is essential to note further that in Section 3 of HR 7641 it is specifically provided that the changes reviewed above would not become effective until five years after they were enacted.

In other words, HR 7641 would simply result in a lowering of the maximum age at which one could serve as a chief judge of a Court of Appeals or a District Court from seventy to sixty-six years, but it would not do this for five years after it became law.

This is not, it should be emphasized, a compulsory retirement measure. It does not mean that a chief judge must retire as a judge when he reaches his sixty-sixth birthday. On the contrary, he can continue as an active full-time judge as long as he lives. All the bill means is that judges sixty-six years of age or over will be relieved of the many administrative duties required of a chief judge, leaving them free to be judges all of the time instead of combination judge-administrators.

The reasons supporting the present age limit of seventy for chief judges of the Courts of Appeal and District Courts were developed at the time it was adopted in 1958. See 2 US Code Cong. and Admin. News, 85th Cong., 2d

Sess., pp. 3256-3260. Wide support of this limit was developed. It came from the Judicial Conference of the United States, the House of Delegates of the American Bar Association, the Attorney General's Conference on Court Congestion and Delay in Litigation, and the Department of Justice. Id. 3258.

As noted on p. 3 of the January 7, 1957, report of the Attorney General's Conference on Court Congestion, the "daily administrative problems" of the Courts of Appeal and District Courts "are difficult and exhausting and... senior judges should not be called upon to handle them in addition to normal duties." Id., 3258-3259.

Everyone continues to recognize, as did the Senate Committee on the Judiciary in 1958, that:

> "There can be no doubt that many [senior] judges... are capable of doing and that they do excellent work in their judicial capacity, and indeed may well function as efficient administrators of the business of their courts. Nevertheless, it cannot be denied, as indicated in the experience of private business, that the toll of years has a tendency to diminish celerity, promptitude, and effectiveness." Id., 3258.

Nonetheless, the experience and judgment of business organizations and colleges and universities in withdrawing executive and administrative duties from officers because of

age must not be discounted. Id., 3259. It is a matter of common knowledge that the prevailing tendency is to attempt to reduce the workload of persons in their mid-sixties, particularly where that work is of a purely administrative nature. In this way the benefit of the judgment and experience of such persons is retained - matters which could not very well be delegated - while administrative duties are delegated to younger persons who might better bear such burden.

This is the principal reason why it is recommended that the age limit in question be lowered from seventy to sixty-six. The question whether there should be any age limit at all has, as outlined herein, already been answered in the affirmative, so the problem now is simply whether that limit should be lowered from seventy to sixty-six. An affirmative answer to this is indicated by the judgment of most of those outside the judiciary.

In any determination of this nature, it is likely but unfortunate that some few individuals may take offense. This unhappy result is minimized in HR 7641, however, by the provision in its Section 3 that the reduction in age limit for chief judges from seventy to sixty-six will not be effective for five years. Thus, any chief judge now sitting is guaranteed a term of office of at least five years,

unless he would be affected by the age seventy limit of existing law. And any other judges who are senior in years but have not yet succeeded to the post of chief judges are assured of at least five more years in which they may do so.

Younger sitting judges will, on balance, be favorably affected - in the sense and to the extent that they may aspire to be chief judges. While their potential terms as such may be reduced, ultimately their prospects of becoming chief judges at all will be enhanced because the age limit reduction proposed will inevitably mean that these offices will have to be filled more frequently.

For all these reasons, the Committee on Jurisprudence and Law Reform recommends that the House of Delegates endorse and support HR 7641, a copy of which is attached to this report.

Chester J. Byrns
Waldo G. Miles
William Poole
John C. Satterfield
J. Olin White
Louis C. Wyman
Jonathan C. Gibson, Chairman

No. 19

80TH CONGRESS
1ST SESSION

H. R. 7641

IN THE HOUSE OF REPRESENTATIVES

APRIL 27, 1965

Mr. SENNER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide that chief judges of circuits and chief judges of district courts shall cease to serve as such upon reaching the age of sixty-six.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (a) of section 45 of title 28 of the United States Code is amended to read as follows:

"(a) The circuit judge in regular active service who is senior in commission and under sixty-six years of age shall be the chief judge of the circuit. If all the circuit judges in regular active service are sixty-six years of age or older the youngest shall act as chief judge until a judge has been appointed and qualified who is under sixty-six years of age,

but a judge may not act as chief judge until he has served as a circuit judge for one year."

SEC. 2. Subsection (a) of section 136 of title 28 of the United States Code is amended to read as follows:

"(a) In each district having more than one judge the district judge in regular active service who is senior in commission and under sixty-six years of age shall be the chief judge of the district court. If all the district judges in regular active service are sixty-six years of age or older the youngest shall act as chief judge until a judge has been appointed and qualified who is under sixty-six years of age, but a judge may not act as chief judge until he has served as a district judge for one year."

SEC. 3. The amendments to sections 45 and 136 of title 28 of the United States Code made by this Act shall take effect at the expiration of five years from the date of enactment of this Act.

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